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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

AHTO WALTER,

Petitioner

v.

NETHERLANDS MEAD N.V.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the case of Ahto Walter, Plaintiff-Appellee versus Netherlands Mead N.V. (A Netherlands Antilles Corp.) Defendant-Appellant (No. 74-1342) on March 20, 1975.

Citations to Opinions Below

The opinion of the United States District Court for the Virgin Islands, Division of St. Thomas and St. John is printed in Appendix B hereto and the opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix C hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered March 20, 1975. Rehearing in banc was denied by order entered May 7, 1975 Appendix C infra. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

1) Under the circumstances of the case, did Walter have a duty under the Federal Rules of Civil Procedure to amend his complaint?

2) Did Walter have a duty under the Federal Rules of Civil Procedure to reply to an affirmative defense raised by Netherlands Mead, N.V.?

3) Was Walter under any duty to communicate to Netherlands Mead N.V. its failure to properly redeem his debentures?

4) Can Walter's pleadings be used to estop him from recovering the debenture income that the District Court found was due him and that the majority opinion in the Court of Appeals agreed was due him but for the estoppel?

Federal Rules of Civil Procedure Involved

The Federal Rules of Civil Procedure involved are Rules 7 (a), 8 (a), 8 (c), 8 (d), 8 (f), 15 (b) and 54 (c) and are set forth in Appendix A.

Statement

On January 1, 1960 Ahto Walter (Walter) entered into an employment agreement with Netherlands Mead, N.V. (Mead), a Netherlands Antilles corporation under which Walter was to manage the Shipping Division of Mead for a period of ten years commencing January 1, 1960. The contract was drawn by Mead's attorney.

On the same date, Walter purchased eight Shipping Division Participating Debentures with a maturity date of January 1, 1970. Thereafter, with the consent of Mead he sold or transferred two of the debentures. At all times pertinent to this case he owned six of the debentures.

On or about September 10, 1963, Walter was discharged from his employment by Mead.

On or about September 20, 1963, Walter filed his complaint alleging that he was improperly discharged and praying for an award of the salary and bonuses that would become due him under the employment contract and for the estimated participation in the earnings of the Shipping Division due him from January 1, 1960 through December 31, 1962 and to become due to him through December 31, 1969.

On or about October 19, 1963 Mead caused a letter to be sent to Walter notifying him that Mead elected to redeem his debentures effective October 31, 1963. Mead offered to pay Walter the sum of $10,000.00 computed as follows: $6,000.00 face amount plus $13,412.11 for participating interest to December 31, 1962 less $9,412.11 representing "the estimated amounts paid you (Walter) or for your account and for which the corporation (Mead) has not received detailed verified accountings or justification for such payments." Certain conditions were also placed upon the offer. Walter did not reply to this offer.

On or about May 7, 1965 Mead filed its answer in which, *inter alia,* it plead "As A First Partial Defense: Insofar as the complaint herein is based on plaintiff's alleged right under the 'Shipping Division Participating Debentures' owned by plaintiff (paragraphs 6, 14 and 16 of the complaint), plaintiff is estopped from asserting any claim thereunder because:

(a) By letter dated October 19, 1963 (a copy of which is annexed hereto as Exhibit "2" and made a part hereof), defendant Mead notified plaintiff of its election to redeem plaintiff's six (6) "Shipping Division Participating Debentures" and tendered payment in full to December 31, 1962 for such Debentures. Plaintiff, having failed to deliver his said six (6) Debentures to defendant, has waived his right to demand payment therefore. Nevertheless, defendant Mead, having elected to redeem plaintiff's said Debentures, all as provided in said Debentures, remains ready, willing and able to make the payment tendered in defendant Mead's October 19, 1963 letter.

(b) Plaintiff, having repeatedly and improperly failed to deliver to defendant Mead or to its accountants, Messrs. Klynveld, Kraayenhof & Co., Curacao, Netherlands Antilles, the books of accounts and statement of receipts and expenses for the period commencing January 1, 1963 to and including the date of termination of plaintiff's employment, has made it impossible to compute the profits and/or losses for such period; and, therefore, plaintiff is estopped from claiming any payment for any period after December 31, 1962 with respect to the six (6) "Shipping Division Participating Debentures" held by plaintiff.

(c) As a result of the termination of plaintiff's association with defendant Mead on September 10, 1963 and as a result of defendant Mead's election as aforesaid, to redeem plaintiff's

"Shipping Division Participating Debentures", plaintiff has failed to state a claim against defendant Mead upon which relief can be granted with respect to his participation in the profits earned by the Shipping Division after October 19, 1963.

(d) If plaintiff is entitled to recover from defendant Mead with respect to his six (6) "Shipping Division Participating Debentures", his right to recover is limited to $19,412.11, the amount of principal and profits with respect to said six (6) Debentures as computed by defendant Mead's regularly employed accountants, as provided in said Debentures, for the period to December 31, 1962."

On or about July 7, 1969, Mead filed an amended answer containing the identical defense.

The case was tried in the District Court of the Virgin Islands in January, 1970. The District Court entered its Memorandum Opinion on March 27, 1973. The judgment of the District Court was entered on January 7, 1974.

The District Court found that Walter's discharge had been proper, but awarded Walter the principal amount and interest on the debentures through their expressed maturity date because it found Mead's attempted redemption of the debentures to have been ineffectual.

Mead appealed and Walter cross-appealed. The case was argued before the Court of Appeals on December 2, 1974 before a panel of three judges; Seitz, Chief Judge and Van Dusen and Rosenn, Circuit Judges. The decision of the Court of Appeals was filed March 20, 1975 with a vigorous dissent by Chief Judge Seitz with respect to the majority's reversal of the District Court's ruling on the debenture issue.

Reasons for Granting the Writ

This petition is directed to the basis on which the Court of Appeals reversed the District Court's ruling on the debenture issue. The majority agreed with the District Court's finding that Mead's attempted redemption was ineffectual but found that Walter's "written statements" contained in his complaint filed September 20, 1963 "estop him from litigating the question whether the attempted redemption was in formal compliance with the debentures' redemption procedure." We contend, as did Chief Judge Seitz in his dissent, that as the attempted re-

demption by Mead took place after the filing of Walter's complaint, "the attempted redemption was a matter of defense. As new defense matter to which no responsive pleading was required, it had to be taken as denied. F.R.C.P. 8 (d)." Chief Judge Seitz continued "The majority opinion points out that Walter did not raise the formal insufficiency of the redemption offer in his pre-trial statement. But neither did Mead mention the redemption defense in its pre-trial statement of 'Questions Presented' filed in January 1970. More to the point, Mead had the burden of proving its partial defense that there had been a valid redemption. Mead, not Walter brought this issue into the case. *The majority would apparently thrust this burden on Walter by requiring him to do what the Federal Rules do not require of him, viz., file an amended pleading challenging the validity of the redemption on the ground that there was a formally defective tender.*" (Emphasis supplied).

Further, Chief Judge Seitz stated "The majority asserts that plaintiff never amended his complaint nor undertook any action to inform defendants of his technical objections to the tender. *But the majority cites no authority for the proposition that plaintiff had a duty to amend his complaint.*" (Emphasis supplied.)

It is thus clear that this case involves an important question of the interpretation of the Federal Rules of Civil Procedure which, as federal law, should be settled by this Court. (Supreme Court Rule 19 [1b]). Left standing in its present posture, this case would require litigants in the Third Circuit to interpret the applicable Rules in a manner inconsistent with the intent of this Court in adopting those Rules.

Rule 7 (a) F.R.Civ.P. clearly sets forth the pleadings allowed. The final sentence of Rule 7 (a) states "No other pleading shall be allowed, except that *the court may order a reply to an answer* or a third-party answer." (Emphasis supplied.) This Rule 7 (a) has been construed as follows:

> "If defendant's objective is to determine how plaintiff will attempt to avoid one or more of the denials or affirmative defenses in the answer, or when he believes there is a serious threat of surprise at trial, assertion of a counterclaim will not help *and he must seek a court ordered reply.*" (Emphasis supplied.) Wright and Miller, Federal Practice and Procedure: Civil § 1185.

Thus it was Mead's burden to seek a court ordered reply to its affirmative defense of redemption if it desired to know Walter's position with respect thereto. Yet the majority opinion in the Court of Appeals put that burden on Walter.

Walter complied fully with Rule 8 (a) in framing his complaint. At that time he had been discharged and he believed the discharge was improper. He believed that Mead would elect to redeem his debentures under the provision that stated "In the event the registered holder hereof ceases, for any reason, to be associated with the Shipping Division of the Company either as an officer, director or employee.....the company may, at its option, redeem this Debenture at its face amount plus any interest the holder would be entitled to receive had this Debenture matured at that time." He could not foresee that Mead would not comply with the redemption requirements of the debentures. The procedure for redemption was spelled out in the debenture itself "Upon sending notice of redemption to the registered holder of this Debenture at his registered address together with payment of such face amount and interest, such holder shall cease to have any rights hereunder."

It was after Walter filed his complaint that Mead made what both courts below held to be an ineffectual redemption and Mead thereafter filed its answer and plead the redemption as a defense. Not only was Walter under no duty whatsoever to amend his complaint so as to respond to said affirmative defense, but Rule 8 (d) F.R.Civ.P. has been interpreted as follows:

> "If in his answer the defendant pleads an affirmative defense, such as the Statute of Limitations, the affirmative defense will be taken as denied or avoided by the plaintiff without any reply, since under Rule 7 (a) *no reply is permitted to an affirmative defense without the Court ordering it.*" (Emphasis supplied.) 2 A Moore's Federal Practice § 8.29.

Further Rules 8 (f) and 15 (b) and 54 (c) F.R.Civ.P. clearly indicate that plaintiff is not bound irrevocably to the theory of action in his first pleading. cf. *Foman v. Davis (1962) 371 US 178, 9 L Ed 2d 222.* cf. also Wright and Miller, Federal Practice and Procedure: Civil § 1279. "For example, an affirmative defense raised in an answer automatically is deemed denied and at issue because no reply is permitted to an affirmative defense in the absence of a court order." These rules were adopted to af-

ford maximum opportunity for a claim to be adjudicated on its merits rather than on the former procedural technicalities. As it turned out, Walter was held to have been properly discharged. However, such discharge did not automatically cut off his contract rights under the debentures, the terms of which were drawn by Mead. Such discharge merely gave Mead the option to elect to redeem and such redemption had to be in conformance with the terms spelled out in the debentures themselves. Mead made its election to redeem but did not follow through with a proper redemption. It plead its attempted redemption as a defense and put in issue every contract theory that it could conceive of.

Walter, of course, had no contractural duty to respond to Mead's ineffectual redemption attempt. He was no longer an employee of Mead. Mead had the contractural duty to either redeem the debentures properly or to continue to pay Walter his participating interest. As stated by Chief Judge Seitz "Finally, in this case Mead's acts so flagrantly violated the debenture provisions that it cannot be said that Mead offered substantial performance. When one contracting party is bound to tender a given performance, and he attempts a tender by offering performance which is substantially different from that contemplated in the contract, his attempted tender should be construed as an offer to reform the contract that gives rise to no obligation on the part of the offeree to accept, and that, if left unaccepted, is utterly ineffectual." cf. 86 C.J.S. Tender § 7 at 562.

Chief Judge Seitz continued "Moreover, given the substantial and obvious manner in which the offered performance was deficient, it is clearly implausible that defendants could have, in good faith, believed the redemption attempt to be valid or that plaintiff could have mislead them so to believe. The estoppel principle is therefore inapplicable under the facts of this case."

The estoppel theory constructed by the majority of the Court of Appeals panel is clearly inappropriate and contradicts the decisions of this Court in this area. The decision of the Court of Appeals is founded on the following statement in the majority opinion "The estoppel arose as the result of Walter's position, first stated in his September 20, 1963, complaint and maintained consistently thereafter, until the suggestion of the District Court itself on January 21, 1970, that Walter's objection to the attempted redemption was that he had been improperly discharged." This statement is clearly erroneous because on September 20, 1963 no attempted redemption had been made.

Mead's attempted redemption was made on October 19, 1963. The sole case cited in the majority opinion to support its finding that Walter was estopped to litigate the question whether the attempted redemption was in formal compliance with the debentures' redemption procedure is Second National Bank v. Lash Corp. 299 F. 371 (3rd Cir. 1924). But as stated by Chief Judge Seitz in his dissent Lash is clearly distinguishable. In Lash the contract sued on was bilateral. Estoppel was applied to prevent the defendant from introducing at trial objections to a tender of performance by plaintiff not pleaded in the answer. In the instant case, the majority applied the estoppel principle against the party seeking to enforce – rather than to evade – a contractual obligation. The debenture agreement required merely unilateral acts by Mead once Walter's employment was terminated. Walter had no duty to speak.

> "On the other hand, the rule is equally clear that mere innocent silence or inaction will not work an estoppel. There must be some element of turpitude or negligence connected with the silence or inaction by which the other party is misled to his injury. In other words, to give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and, in addition, an obligation or duty to do so. *****
> Nor is a person under obligation to do or say anything concerning a proposition which he does not choose to accept. The mere fact that another may act to his prejudice if the true state of things is not disclosed does not render silence culpable or make it operate as an estoppel against one who owes no duty of active diligence to protect the other party from injury." cf. 28 Am Jur 2nd, Estoppel and Waiver § 53.

Finally, "The Federal Rules of Civil Procedure reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson 355 US 41, 2 L Ed 2nd 80, 78 S Ct. 99 (1957). The Court of Appeals in the majority opinion in the instant case went to great lengths to construe statements made by Walter's counsel at trial to indicate that Walter had only one theory of recovery on which he could proceed, namely his alleged improper discharge. But this construction does violence to the teachings of this Court in its interpretation of the

Federal Rules of Civil Procedure. Mead was definitely on notice of the terms of the debentures. It claimed no surprise at trial with respect to proceeding on the question of whether or not its attempted redemption on October 19, 1963 was in compliance with the contract terms of the debentures. It could hardly do so since it had raised the issue of the attempted redemption in its answer.

Conclusion

The decision of the Court of Appeals for the Third Circuit contravenes the decisions of this Court with respect to the requirements of pleading under the Federal Rules of Civil Procedure and with respect to the invocation of the principle of equitable estoppel and it is respectfully submitted that this petition for a writ of certiorari be granted.

Charles S. Waggoner II
Attorney for Petitioner

Certificate of Service

I hereby certify that on August 4, 1975, three copies of the foregoing Petition for Writ of Certiorari were served on Thomas N. Dowd, Esq., Pierson, Ball & Dowd, 1000 Ring Building, Washington, D.C. 20036, attorneys for Netherlands Mead N.V., by depositing the same in the United States Mail, correctly addressed, airmail postage prepaid.

Charles S. Waggoner II
Attorney for Petitioner

APPENDIX A

Rule 7 (a) Pleadings.

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Rule 8 (a) Claims For Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 8 (c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 8 (d) Effect Of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are ad-

mitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Rule 8 (f) Construction of Pleadings.

All pleadings shall be so construed as to do substantial justice.

Rule 15 (b) Amendments To Conform To The Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 54 (c) Demand For Judgment.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against who a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

APPENDIX B

[Filed March 27, 1973]

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
Division of St. Thomas and St. John

Civil No. 284/1963
Action For Debt

AHTO WALTER

Plaintiff

vs.

NETHERLANDS MEAD, N.V., ET AL

Defendants

MEMORANDUM

In this action, styled in debt, plaintiff seeks to recover the total sum of $325,552.00 from defendant, claimed to be due plaintiff as (a) salary under the terms of an allegedly breached contract of employment and (b) participating interest on the net income of defendant in a certain specified venture, together with his costs and reasonable attorney's fees.[1] Defendant by its answer and the defenses set forth therein, in effect denied the indebtedness. (Except as to its calculation of the amount due for the debentures). It also levelled ten counterclaims against

[1] The action, though commenced on September 20, 1963, did not come to trial until January 10, 1970. After four consecutive days of hearing, the cause was adjourned until February 10 and 11, when it was finally concluded. Post trial briefs were ordered but it was agreed that the time within which they were to be prepared and submitted would not commence to run until after a transcript of the testimony had been prepared and filed. For valid reasons the transcript (six volumes) could not be completed until January, 1971. Considerable leeway had to be allowed counsel for reading the transcript and preparing of briefs. This time was duplicated by the Court's reading of the transcript and examination of the unusually large number of exhibits. Further time was lost due to the Court's illness. For all the foregoing, the Court is grateful to all, the parties in particular, for their patience and indulgence.

plaintiff.[2] As to the counterclaims numbered "Second", "Sixth", "Eighth" and "Ninth", it was conceded that they should fall for failure of proof. The others, in their chronological order, sought to recover $38,377.21 as reimbursement for alleged unauthorized withdrawals; $250,000.00, damages growing out of a claimed breach of the non-competition clause of the parties' employment agreement, the setting up and sale of a competing supermarket and the hauling of freight on the Santo Antonio, for the supermarket without charge; $5,000.00 damages for allegedly refusing to deliver books, records, papers, etc.; $25,000.00 for use of Mead's funds for office rent and office equipment, the latter supposedly retained by plaintiff; for loss of income and profits by reason of plaintiff's charged malicious conduct in the amount of $100,000.00; and lastly $28,946.02 as damages for plaintiff's negligent performance of his duties in permitting the Santo Antonio's condition to deteriorate. By agreement of the parties, the case was tried to the Court sitting without a jury.

The plaintiff was represented by Thomas D. Ireland, Esquire. The defendant was represented by BAILEY, WOOD & ROSENBERG, (Messrs. Bailey and Rosenberg, of counsel).

The Court having heard and considered the evidence adduced, and having read and considered the briefs submitted on behalf of the parties, now makes the following findings of fact and conclusions of law, pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiff, AHTO WALTER, (Walter) is, and at all times pertinent hereto was, a resident of St. Thomas, U. S. Virgin Islands. Defendant, NETHERLANDS MEAD, N/V (Mead) was at all relevant times a Netherlands Antilles Corporation.

Walter, through Walter Quick Freeze Corporation (WQF), a closed corporation which he had organized, and of which he was, at the outset, the principal stockholder, established and owned

[2] Originally one W. M. O'Neil, who eventually became owner of all the capital stock of Mead, and later, through that corporation, came to exercise control over Walter Quick Freeze when Mead acquired the controlling interest in Walter Quick Freeze, was named as a defendant. The claim against him was later dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

Appendix B

Lucy's Grocery Markets in St. Thomas, Virgin Islands. This was during the 1950's. By dint of training and experience over the many earlier years, Walter was thoroughly knowledgeable in the area of shipping, and for that matter, in ship building.

In 1959, Walter, on behalf of WQF, arranged the purchase of the motor vessel, Santo Antonio. However, by virtue of an arrangement made with his close personal friend, one R. S. Reynolds, the purchase was consummated by Mead, then wholly owned and controlled by Reynolds. Apparently in return for the purchase of the vessel by Mead, WQF, on January 1, 1960, entered into a "Shipping Requirements Agreement" with defendant Mead.

Under the provisions of the shipping agreement, the term of which was ten years, Mead and WQF agreed that all cargo brought into the Virgin Islands by WQF was to be shipped via the Santo Antonio. WQF was to be a highly preferred and indeed the chief customer of Mead's "Shipping Division." The Santo Antonio could accept other freight only if there was space over and above WQF's needs and if the acceptance and delivery of such cargo would not cause delay in deliveries for WQF. Additional obligations assumed by WQF were, a guarantee to meet the deficiency in any month that operating expenses exceeded freight charges and a further guarantee of minimum gross revenues of $180,000 for 1960 and $216,000 in 1961, and the subsequent years of the agreement. Additionally, WQF undertook to pay to Mead, "as additional freight", 50% of its net profits in each of the years of the agreement. Mead, on the other hand, covenanted to favor WQF with relatively low freight rates and to meet all of WQF's shipping requirements so long as WQF gave advance notice of its needs, sufficient to permit the efficient and economical scheduling of the movements of the Santo Antonio. The foundation stone of these intricate arrangements was the underlying personal relationship between Reynolds and Walter, between whom there was highest confidence and respect, and who counted on the venture to succeed primarily because of this mutual esteem. Thus, it was that WQF held an option to purchase the Santo Antonio in the event of Reynold's death or the termination of his ownership of Mead. By the same token Mead could terminate the agreement upon Walter's death

Simultaneously with the execution of the shipping agreement,

a ten year Employment Agreement was entered into by Mead and Walter. By the terms of this agreement Walter was to serve as managing director of defendant's shipping division, the Santo Antonio operations being the sole business of the division. That contract provided that Walter was to have "sole responsibility for the management of the Shipping Division and shall report, as required, to a committee appointed by the Board of Directors of Employer for its Shipping Division." Walter was to receive $12,000 per year for his services, subject to stated contingencies which might cause his stipend to move up or down. He could be removed from his position for cause only. The contract for employment contained non-competition and exclusive employment clauses, running against Walter.

In conjunction with his employment agreement Walter purchased eight profit sharing debentures of Mead at a face value of $1000 each. The debentures entitled him to a total of 32.2% of the annual net profits of the shipping division (4.4% per debenture per year). Mead reserved the right to redeem them at face value plus interest if, for any reason, Walter's association with the shipping division ceased. Redemption of the debentures required the sending of notice thereof to the holder's registered address accompanied by payment in full.

For approximately two years Walter pursued his dual tasks as manager of WQF as well as Mead's shipping division. As time went by the working relationship was complicated in practice by steadily increasing clashes between Walter and officials, stockholders and employees of the two companies. The bone of contention was Walter's authority and responsibility. Things took a turn for the worse when Walter, by virtue of a sale of some of his stock late in 1961, lost control of WQF.

In January of 1962, Walter was dismissed as manager of WQF. Since he had run both jobs out of his WQF offices, he transferred the shipping division's business to his home, at first, and later rented office space to Palm Passage, St. Thomas, Virgin Islands, for the conduct of the business growing out of the Santo Antonio operations.

On November 8, 1962, the directors of Mead wrote to Walter requesting that he transfer all funds maintained by him in St. Thomas for account of the Santo Antonio in excess of $15,000

to a Miami account. By letter of November 16, 1962, Walter declined to comply. He justified his refusal on the grounds that $15,000 would provide too small a margin for the prudent operation of the vessel and that he lacked confidence in the directors of Mead, and therefore, felt compelled to keep an adequate amount of funds on hand to guarantee payment of accrued debenture earnings to him at year's end. Repeated requests, variously phrased, went unheeded until July 1963, when plaintiff made a substantial transferral of money to Miami.

In about November of 1962, Walter conceived of the idea of erecting a modern supermarket to replace one or more of the what he considered to be, obsolete markets being operated by WQF. For this purpose he entered into a lease agreement with the West India Co., Ltd. on December 1, 1962, and thereafter commenced the construction of the market. His motive in undertaking this venture was to salvage his still substantial investment in WQF, which he was persuaded was going "downhill". He proposed to save WQF by presenting his plan, with the new market completed, to O'Neil.

O'Neil had, by January, 1963, acquired full ownership of Mead. He was then president of WQF. By May, 1963, O'Neil, through Mead, had the controlling interest in WQF, in exchange for satisfaction of a $180,000 debt due Mead, plus a $20,000 freight credit. Thus, by the middle of 1963, Reynolds, Walter's trusted friend, was effectively out of the picture. Any basis in camaraderie for the 1960 agreements had vanished.

Plaintiff continued with the construction of his market without word to defendant or anyone connected with it. On August 12, 1963, O'Neil and Walter met (at Walter's instance, I gather) on the gallery of the Grand Hotel. There they discussed the ship operations, Walter's new market, and his plans therefor. By this time, and from perhaps as early as May, 1963, O'Neil had been considering discharging Walter. Nonetheless, the Grand Hotel meeting went smoothly. Walter laid bare his plans and aspirations and O'Neil appeared to receive them with favor, to the extent that two handwritten memoranda were prepared and signed by the two men. One of them provided for "buying out" Walter and his leasehold in the event his proposal for future management and operations of WQF business were not found

acceptable. The other envisaged the continuing operation of the shipping division by Walter under the then current terms except that Walter's six debentures[3] would be retired at a figure to be determined after the September, 1963 trip of the Santo Antonio, with Walter to receive some 30% of the ship's net earnings thereafter. While Walter saw these writings as firm contracts, made more so by a hand-shake, O'Neil viewed them to be as flimsy as the paper (luncheon napkins) on which they were written. Within the fortnight a letter from him to Walter made this clear. Further negotiations either were not taken or if attempted did not prosper. No formal document enbodying the memoranda was ever signed.

By cable and letter of on or about September 10, 1963, plaintiff was discharged as manager of the shipping division. Thereafter, on October 4, 1963, Walter sold his leasehold and improvements thereon to Pueblo Supermarkets of Puerto Rico (Pueblo).

On October 19, 1963, Mead wrote to Walter advising of its election to redeem his debentures, tendering its check for their face value plus interest as of December, 1962 less an amount claimed to be due it for unexplained expenditures of its funds by Walter. Walter, contending that the attempted redemption was inefectual, declined to accept tender and eventually commenced this suit.

It can fairly be said of all the foregoing that they are indisputably established in the record. No discussion of them is required or needful. I pass on then to hotly contested issues on the resolution of which the decisions to be made in this case turn. My conclusions of law are stated in the discussion which follows.

THE TERMINATION OF PLAINTIFF'S EMPLOYMENT

Atho Walter's discharge is certainly the vortex of all the conflicting charges in this litigation. A prefatory note is therefor in order, i.e. an employer need have but one valid reason in order to properly discharge an employee for cause. Moreover, it is not necessary that the employer be aware of an infraction which justifies dismissal at the time of the discharge. Upon a material breach of an employment contract, an employee may be proper-

[3] He had earlier sold two of his original eight to O'Neil.

ly terminated without regard to the adequacy of the reason stated. *Restatement of Contracts* § 278 (see particularly Illustration 1); *Lobriko v. Wyman*, 290 F2d 12 (3 Cir. 1923).

The alleged failure of Walter to follow orders takes two forms – failure to report and failure to transmit funds on demand. In dealing with these charges it should be kept clearly in mind that Walter, as Manager of the shipping division cannot be equated with an ordinary employee. The title "manager" necessarily imports general authority to perform all reasonable functions in conducting the usual and customary business of the organization or firm. This is especially true where, as here, Walter, by virtue of his employment contract had greatly expanded authority and responsibility. He would, nonetheless, be expected to give due regard to requests or inquiries relative to operation or income of the business.

In retaining Walter as "Managing Director" of its Shipping Division, Mead gave him "sole responsibility for the management" of it. Walter was directed to "report as required, to a committee appointed by the Board of Directors of the Employer for its Shipping Division." The very designation "Managing Director" in itself suggests that he was intended to exercise general oversight of Mead's shipping affairs, for the term has well established significance between mere employees and superior personnel with added authority to act for the employer, and concommitant responsibility for such conduct; e.g. *Petition of Canadian Pacific Ry. Co.* 278 F 180(DCND Wash. 1921); *California Shipbuilding Corporation v. Industrial Accident Commission et al*, 148 F2d 432 (Dist. Ct. of App., Cal. 1944). Thus plaintiff's response to proferred instructions cannot be evaluated strictly under common law principles of master and servant; his position cannot be so narrowly defined. Further, inasmuch as his employment contract sets out only one condition to his authority – that he "report, as required, to a committee appointed by the Board" – any additional conditions must be clearly suggested by the circumstances of his employment.

Plaintiff, as indicated above, was to report to a "committee appointed by the Board of Directors of the Employer for its Shipping Division," but no such committee was ever formally appointed. Instead, the parties treated the Board and the proposed committee as synonomous. However, under § 463 of the

Restatement of Contracts, where performance under a contract is impossible only in part, due to the failure of an essential thing to come into existence as expected, and yet "performance of the whole contract is possible with only an unsubstantial variation, the promisor is under a duty to render performance with that variation." In this instance, it appears that the Board did act in place of a formally designated committee, not only to receive Walter's reports, but also to fix his salary. Such a substitution, while rendering complete performance under the precise terms of the contract impossible, did not constitute a substantial or burdensome variation. On the contrary, all parties evidently accepted the unwritten substitution without objection. More precisely the Board acted for the proposed committee in some respects, and other mechanisms were adopted in the same informal manner to supplement the Board's supervision – including the services of a company accountant to whom plaintiff submitted financial reports after each voyage, and who, in turn, forwarded reports to the company offices in Curacoa. This arrangement was approved by the Board. In view of this substitution under the contract, it clearly appears that Walter's duty to report was rendered less a formal requirement in favor of more practical results. Realistically, his procedure of filing financial reports with the company accountant after each voyage, including cancelled checks, bills of lading, and so on, certainly was the equivalent of the original reporting requirement in practical import, and I find that in this respect plaintiff's performance was adequate.[4]

Ahto Walter, however, was obligated, although not by explicit contractural command, to obey the directions of his employer, insofar as those directions were not inconsistent with the terms of his written contract, *9 Williston on Contracts,* § 1013B, Third Edition. Mead charges that his failure to relinquish company funds upon request constituted a violation of that obligation.

[4] The reports which the company accountant sent monthly to Mead's headquarters can certainly be deemed reports from Walter. They contained all the pertinent information which Walter had both as to ship's operation, itinerary (even if after the fact) and all financial information regarding the ship. As to other requests, e.g. advance notice of scheduling, I accept Walter's explanation that in the circumstances this was not possible. Moreover, I doubt whether the Board could dictate to Walter in the matter of the scheduling of the ship's voyages.

Appendix B

Both the duty to remit the funds, and the mandatory tone of the request to do so, however, are disputed by Walter. Plaintiff contends that the contract granted him broad discretionary powers to operate Mead's shipping, and pursuant to that grant he was free to disregard orders to transmit funds if, in his opinion, those funds were necessary to the reasonable and prudent operation of the division. He insists that he was of that opinion at the time when he declined to forward the requested funds, and accordingly, his decision was justifiable and could not render him subject to discharge. *Park Bros. & Co. Ltd. v. Bushnell,* 60F 583 (2 Cir. 1894), an old but quite similar case, provides invaluable insight and guidance in this aspect of Walter's situation.

In *Park Bros. & Co. Ltd.*, the second circuit distinguished between two types of orders allegedly disobeyed – general and specific orders – and it laid down two tests. As to the former the Court opined that refusal to obey a reasonable order was not, as a matter of law, ground for dismissal. The Court explained. "It is manifest that the relations of Bushnell [the employee] to the defendant were not those of a menial or domestic servant to his master. He was the superintendent of a large and important business for a long term, and constantly obliged to be the representative of the defendant in different states, and to attend with promptness, resoluteness, and good judgment to its large pecuniary interests. The judge, in view of those considerations, charged that what would justify the recission of a contract for employment in the case of a mere workman or clerk might not justify it in the case of a person whose duties were of such a character as those which were intrusted to the plaintiff....." (60F. at 585).

However, the Court emphasized that disobedience of a specific order was of a "different character", and applied a stricter test. As to such a violation of orders, the Court stated: "The violation by a salesman or superintendant of his employer's definite and positive instructions in regard to the terms or amount of a particular pending sale of merchandise is adequate cause for discharge....." (p.589) and the Court noted that it was error for the trial court to permit the jury to consider the extent of injury to the employer or the employee's subsequent obedience of the original order, in mitigation of the disobedience, (p. 589).

Applying the *Bushnell* test to defendant's requests of plaintiff to forward company funds in his possession, only if the re-

quest did not convey "positive and definite instructions" can Walter's disobedience be excused.

Walter insists that, in consideration of his broad contractural discretion, the requests for funds were merely suggestions, without hint of a mandate, but the evidence is to the contrary. On November 8, 1962, Lidstone wrote to Walter: "[s]ince we are trying to make some necessary arrangements, Bill O'Neil and I wish you to transfer to Netherlands Mead's account with the Miami Beach First National Bank that in the Chase Manhattan Bank [in St. Thomas] in excess of $15,000." Plaintiff declined to forward the funds by letter of November 16, 1962, and received two communications immediately thereafter. On November 20, Lidstone replied by letter: "I have written to you at length because I wish to emphasize that it is clearly improper for you to retain corporate funds for your personal purposes as you indicated in your November 16, 1962, letter. I therefore suggest that you transfer the funds over $15,000 to the Miami Beach account as promptly as possible. If you continue with your unreasonable refusals, you will force the directorate of Netherlands Mead to take affirmative action with respect to the bank." Then on November 21, Smeets, Managing Director of Mead cabled the order in unambiguous terms:

> Please transfer immeidately all funds over fifteen thousand dollars from Chase St. Thomas to Miami Beach First National Bank for Netherlands Mead Account.

It hardly requires mention that the introductory word "please" in Smeets' cable does not detract from its mandatory character. On December 3, at a meeting of the Board of Directors of the Shipping Division, Walter was again instructed to transmit the funds. The minutes of that meeting record that he was asked whether he "had complied with the instructions of the Managing Director....." and he replied that he had not. "The Directors then urged him to comply so that there could be no question about his cooperation." Viewing this interchange as a whole I find that the instruction to forward the funds was "positive and definite" and consequently, Walter's violation of the order was sufficient to justify his discharge. My conclusion is reinforced, I might add, by the fact that his disobedience was not, as his own letters reveal, based on a pure and *bona fide* interest in the

efficient operation of the ship, but rather was a reflexive move to protect what he believed to be his personal financial interests. He expressed this motivation clearly in his letter of November 16 in commenting on his dissatisfaction with the conduct of the Directors of WQF, some of whom also served on Mead's Board: "Judging from the kind of treatment I got from the Board of Directors at Walter Quick Freeze, I surely cannot expect anything different from the same men on the Board of the Shipping Division. I therefore feel that it is only prudent for me to keep a substantial amount of the 'Santo Antonio' until the end of this year when the statements should be made available and profits distributed to debenture holders." This motive, clearly improper and unauthorized even in the context of the broad authority he enjoyed, indicates that his disobedience was willful and insubordinate, and standing along would justify his immediate discharge, (9 *Williston on Contracts* § 1013B, p. 49). Given the firm and unequivocal nature of the order, and his basic duty of obedience, the discharge of plaintiff was unquestionably proper.

Having resolved the validity of plaintiff's discharge on the ground discussed above, I see no necessity or good purpose to be served by reviewing other reasons relied upon by defendant in justification of its action. I turn then to another brand of discord between the parties.

THE DEBENTURES

It was provided in the debentures, among other terms, that, if, for any reason, the holder thereof ceased to be associated with Mead's Shipping Division, the company, at its option, could redeem such debentures at face value, plus interest to the date of redemption. A further proviso was that "upon sending notice of redemption to the registered holder.....at his registered address together with payment of such face amount and interest, such holder shall cease to have any rights hereunder." By letter dated October 19, 1963, A.A.G. Smeets, Managing Director of Mead, notified Ahto Walter that, pursuant to its right of redemption, his interest under the company debentures was terminated. The letter went on to state that company accountants fixed the accumulated interest due Walter on his six debentures at $13,412.11 up to December 31, 1962. Smeets informed Walter, however, that interest for 1963 could not be computed

until he relinquished the financial records of the Santo Antonio for the months involved. Smeets promised that Walter would receive interest for that period within 90 days of delivery of those records. The Managing Director continued: "In the meantime, upon your delivering (sic) to James A. Bough of the certificates for six Shipping Division Debentures, each properly endorsed for transfer to the Corporation with all appropriate tax stamp affixed thereto, you will be delivered the Corporation's check for $10,000 representing the amount due you to December 31, 1962 ($19,412.11 - $6,000 principal amount plus $13,412.11 accumulated interest as computed by the Corporation's accountants) less $9,412.11, representing the estimated amounts paid to you for your account and for which the Corporation has not received detailed verified accountings or justification for such payments."

Plaintiff contends that the attempted redemption was ineffective because it failed to provide the proper payment required by the terms of the debenture. In this connection he challenges both the company's computation of the sum due him and the offset taken in accordance with the company's computation of amounts allegedly due it from him for unauthorized expenditures.

As to the base computation, three questions are presented. Firstly, the propriety of defendants decision not to compute or tender interest for the months of 1963 which preceded plaintiff's discharge. Mead explained that such computation was impossible until Walter turned over financial records for that period, in his possession, to the company's accountants; secondly, whether the Santo Antonio was more properly depreciated over a nine year useful life as defendants did in computing profits, or an eighteen year useful life as plaintiff insists they should have done; and thirdly, should defendants have deducted a certain bad debt brought about by the embezzlement of corporate funds by Walter's successor in the sum of $20,000, in arriving at net profit for the computation of debenture earnings.

Addressing myself first to the problem of interest for the portion of 1963, prior to October 19, Mead charges that such amounts were not subject to computation or tender by reason of plaintiff's wrongful refusal to provide the necessary financial data, and excuses it failure to perform in that particular on that

basis. It is evident that in order to compute profits under ther terms of the debenture, Mead had to have financial data on the shipping operations which plaintiff customarily possessed. Thus, an implied condition precedent to Mead's promise to tender payment of accumulated interest was Walter's cooperation in supplying the necessary information. Section 395 of the *Restatement of Contracts* provides that a "contractural duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty." A comment to that rule is pertinent to the instant question:

> Performance of a promise frequently requires cooperation by the promisee. When this is true, the requisite cooperation is a condition qualifying the promisor's duty...

Applying the Restatement rule to Mead's failure to tender interest for 1963, and to Walter's failure to provide the prerequisite data for computation of that sum, I conclude that plaintiff's refusal to co-operate excused Mead's duty in that respect. While I cannot rule that the duty to pay interest for that period is permanently excused, I do hold that failure to include that unknown amount in the tender could not, in itself, constitute a fatal flaw in Mead's attempted redemption of the debentures and termination of Walter's rights to further profit – participation.

The problem of the proper term of depreciation to be applied in the case of the Santo Antonio was treated by accountants called by both sides. Giving due consideration to the testimony of each, I find, on balance, that the nine year life used by Mead was too short and that an eighteen year life would be more in keeping with sound accounting practices.

Gustav Danielson, the accountant called on behalf of plaintiff, in advancing the 18 year depreciation period, grounded his recommendation on a comparative study of the useful life of substantially similar assets (Tr. 649-651). Warren Bough, defendants expert in this area, urged the nine year depreciation because he felt that the refrigeration equipment was useful over that period only, implying, I gather, that upon the expiration of the useful life of the refrigeration equipment, the entire vessel would become useless (Tr. 658). Milton Hatfield, another of defendant's accountants, though perhaps harboring doubts as to

his competence to speak in this specialized field, apparently adhered to Danielson's procedure of referring to the "historical lives of similar assets". Hatfield concurred with Danielson further in suggesting that standard and accurate financial reporting dictated that an asset be amortized over its real life (Tr. 662). And Fred H. Hallbauer, plaintiff's marine surveyor, and established as highly knowledgeable as to virtually all types of bottoms estimated the reasonable life of the Santo Antonio, including equipment, to be 15 to 20 years. (Tr. 664). Moreover, as Danielson pointed out, subsequent to 1967 (Walter then being out) the depreciation rate for the Santo Antonio was modified to accord more closely with his opinions (Tr. 651). It is because of all the foregoing that I find the 18 year depreciation rate to be more probably accurate than the 9 year life advanced by defendant.

Finally, turning to the so-called "Shinnick Debt", it appears that the controversy is largely one of equity. In essence, plaintiff urges that though his successor (who Walter insists need never have been hired) indulged in thievery of corporate assets, the consequent loss is fateful retribution upon Mead for his wrongful discharge, and under no circumstances should he be penalized in Mead's company. I view the propriety of plaintiff's challenge to the redemption, however, as dependent upon the test of "standard accounting practices," and if the deduction of bad debts due to embezzlement is in accord therewith, plaintiff's invocation of a higher justice will avail him nothing.

To the extent that income tax accounting reflects common and accepted procedures, it is relevant to note that losses due to embezzlement are deductible in computing taxable income, (which is comparable to net income apart from the deduction of federal taxes themselves), 34 Am. Jur. Fed. Tax §6651. Considering plaintiff's failure to offer testimony that deduction of this loss would violate standard accounting practices, and with due regard for the Treasury Department's treatment of the question, I conclude that the defendant properly made the deduction for the "Shinnick Debt".

Walter's objection to the tender by reason of the deduction of certain monies claimed by Mead, however, stands on much firmer footing. Under the terms of the debentures, the sole means by which Mead was empowered to terminate Walter's

rights in them were specifically recited. Mead reserved the right to redeem each outstanding debenture upon termination of the holder's association with the Shipping Division for whatever reason, "at its face amount plus any interest the holder would be entitled to receive had [the] Debenture matured at that time." The procedure for exercising that option was also prescribed:

> Upon sending notice of redemption to the registered holder of this Debenture at his registered address *together with payment of such face amount and interest,* such holder, shall cease to have any rights hereunder; (emphasis supplied).

Although the option contemplated Walter's disassociation for any reason, (which would certainly include misuse and misappropriation of, as well as failure to account for, funds), no right of offset was specifically reserved in the contractural document which Mead, itself, drafted. No citation of authority is required to posit the proposition that a document, where it is ambiguous, must be construed against its author. As the comment to Restatement of Contracts § 236 (d) explains, "[s] ince one who speaks or writes, can, by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved against the former in favor of the latter....."

This is not to say that Mead had no right to pursue its legal remedies with respect to the claimed monies. Certainly such a course was open from the outset. I hold merely that under the terms of the debentures, there was no room for the deductions which Mead took from the sums due to Walter in an effectual redemption terminating his rights thereunder. For this reason, I conclude that Walter's rights were not terminated in 1963 by the attempted redemption, but continued throughout the entire period of participation to January 1, 1970. Accordingly, the sums due him must be computed to include the appropriate percentage of net profits for the years preceding and following the attempted redemption, taking into account this Court's resolution of the depreciation problem, and all other adjustments, with interest thereon to the present date.

I direct my attention now to such counterclaims of Mead's as yet remain for disposition.

Appendix B

FIRST COUNTERCLAIM

Mead challenges withdrawals of corporate funds by Walter to purchase traveler's checks, to pay expenses of travel and hospitalization associated with an illness plaintiff testified he contracted in Central America while on company business, and also a sum taken by Walter as vacation pay.

At trial, plaintiff testified and submitted a written exhibit to explain the withdrawals for travelers checks on all four occassions as to which defendant's records reflected substantial expenditures therefor. On October 17, 1961, he identified the checks as drawn to cover expenses of a voyage to Holland to obtain something for the ship, and his notations indicate he submitted vouchers in that connection to Bough, Mead's counsel. On December 14, 1961, he testified that he drew checks for expenses contemplated for a trip to Europe to locate Mr. Reynolds in an attempt to resolve certain difficulties he was encountering with the corporation, but upon failure to locate Reynolds, he stated that he refunded this sum to the corporate account. He justified his purchase of checks on July 17, 1962, as necessary for a trip to Europe to get a licensed engineer for the ship, to pay the engineer's transportation back from Europe, and to purchase something for the ship's engine. Finally, he reported that a withdrawal on December 10, 1962, was used to finance a further trip to Germany for hydraulic parts for the ship, and to purchase those parts, but his records in any case indicate refunds to the corporate account in excess of 50% of the sums so withdrawn. He expanded on these explanations, in relation to the necessity for traveling to Europe rather than communicating with suppliers by telephone, for example, by explaining that in each instance, his personal presence avoided substantial delay in securing the parts and prevented interruption of the ship's schedule.

Under the *Restatement of Agency, Second* § 382, (which is applicable to plaintiff's relationship to defendant, even if it is characterized as one of master-servant, *Restatement of Agency Second* § 25):

> Unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of the principal.

He is also obliged to act only as authorized, or where no instruction has been given, in accordance with reasonable customs, good faith and discretion, § 383. Both of these requirements, however – to account and not to exceed authorization – are qualified by conceptions of reasonableness. Specifically, Comment (a) to § 382 notes that an agent's "duty in these respects is satisfied if he acts reasonably on view of the business customs of the community and the nature of his employment." Further, in explanation of the duty to act only as authorized, including expenditure of the principal's funds of course, comment (a) states:

> It is only conduct which is contrary to the principal's manifestations to him, interpreted in light of what he has reason to know at the time when he acts, which subjects the agent to liability to the principal.

Walter testified, without contradiction, that he was never criticized with respect to the challenged withdrawals until the instant counter-claims were filed, although he reported the expenditures each month over the years of his employment (Tr. p. 387). Although the burden of proof rests on the plaintiff as fiduciary, to show that the funds have been disposed of "in accordance with his authority", *Restatement of Agency Second* § 382, Comment (e), that burden upon the record before me has been satisfied. It is my finding that Walter has justified his expenditures by a preponderance of the evidence, in light of the special circumstances surrounding his employment and the total absence of instruction concerning expenditures. I further find that his good faith in the challenged transaction has been clearly shown.

I consider next plaintiff's withdrawals for medical expenses and associated expenditures. In this area there is a conflict of authority among the jurisdictions, and most cases dealing with an agent or officer's power to obligate an employer for medical expenses rendered to an employee are quite old (see annotation 71 A.L.R. 638, and cases collected). Moreover, the issue here presented is somewhat different in that most of the case law arises out of claims for compensation by the attending physicians, and many of these decisions turn on the presence or absence of a duty of care to the ill or injured party. Nonetheless, under § 383 of the Restatement cited *supra*, it is significant that plaintiff had no indication from Mead that such expendi-

tures – assuming their business connection – were disapproved. As early as September, 1962, he had authorized such expenditures on behalf of a crew member of the Santo Antonio without objection. Indeed, at no time throughout the instant litigation has Mead suggested that it would not have authorized such payments, but merely that Walter failed to provide "the details concerning what he was doing and where he was at the time....." he contracted the disease (Defendant's Post Trial Memorandum, p.17). After review of Walter's explanation of the circumstances surrounding his illness and in light of his prior experience with authorization of expenditures for medical care of a corporate employee I find that his conduct did not exceed his authority, and, as to this claim, that defendant is not entitled to restitution.

Additionally, Mead objects to plaintiff's withdrawal of $2,000 as "vacation pay" on the day following dispatch of his notice of discharge. Walter attempted to justify his withdrawal of this sum as compensation for vacation due. He testified that he had not taken any vacations, aside from a single period of sick leave, during his entire employment with Mead. His right to vacation pay, completely aside from the propriety of the circumstances under which he took it, is doubtful, as I have up held his discharge. An employee's right to such a payment is dependent upon the terms of his contract express or implied, 53 *Am Jur 2d*, Master and Servant, § 80, and this contract makes no specific reference to such a right. It fixes his salary and specifies monthly payment thereof, but it clearly leaves his working schedule to subsequent resolution, in light of the emerging circumstances. Paragraph 2 of the Contract provides in part:

> During the term of this Agreement, Walter shall devote such time and energy to the furtherance of the business of the Employer as its Managing Director of the Shipping Division as may be required.....

This paragraph suggests that Walter's time requirements were expected to be flexible, but it fails to express any guarantee of fixed vacation periods or pay. The implication is that if his full time attention proved necessary to efficient operations, such would be expected. The general rule, as I understand it, is that employees terminated for cause are not entitled to vacation pay, at least where their employment terminates prior to the end of

the employment year, *Sinnett v. Hie Food Prod., Inc.*, 185 Neb. 221, 174 NW 2d 720; See generally cases collected at 91 ALR 2d 1078, 1087 and *c.f., In re Pringle Engineering & Mfg. Co.*, 164 F2d 299 (7 Cir 1947). Coupling the absence of contractural obligation to Walter to provide vacation pay with his discharge for cause, I cannot find his withdrawal of $2,000 following notification of termination to be justified even as vacation pay. Accordingly, as to this portion of defendant's first counterclaim, it is entitled to recover.

FOURTH COUNTERCLAIM

I deal with this and the following counterclaims next inasmuch as the THIRD and SEVENTH counterclaims are taken up together.

Plaintiff conceded in his testimony that despite defendant's demand, he had withheld records for the Santo Antonio after his discharge. He stated that he "just thought that the best thing to do was to hand them over to [his] attorney and see how he wants to handle it," (p. 196). Upon further questioning he added that there was no appropriate person representing Mead in St. Thomas to whom he could have delivered the records. This explanation, however, cannot pass muster as it is apparent that communication by mail was readily available and feasible. Under the *Restatement of Agency Second* § 402 (1) (c), an agent (or employee) is liable to his principal for the value of a chattel which he withholds, if his principal is entitled to immediate possession thereof, or to damages for his misconduct, if he unreasonably refuses to surrender it on demand. Moreover, Comment (b) to that section indicates that harm to the principal's interests by such conduct is immaterial. Applying that rule to plaintiff's actions, I think it is indisputable that Mead demanded and was entitled to immediate possession of the records of the Santo Antonio which Mead owned and, of necessity, would continue to operate following Walter's discharge. The problem is one of fixing damages, which Mead offered no evidence to establish. According to § 331 (1) of the *Restatement of Contracts*, damages are recoverable for losses caused by a breach of contract "only to the extent that the evidence affords a suffi-

cient basis for estimating their amount in money with reasonable certainty." Failing such proof, only nominal damages may be allowed, § 328. I cannot make a reasoned estimate of defendant's losses in this regard, and I will, therefore, allow only $100 as damages for this misconduct.

FIFTH COUNTERCLAIM

Mead has accused Walter of purchasing certain equipment charged to the corporate account and retaining the same. It indicts him too with transporting equipment, via the Santo Antonio, which was destined for the new supermarket he was constructing, without charging for freight. As to the chattels, Walter admitted purchase of each item with corporate funds, and retention after his discharge for personal use (Tr. 219, 272-5). His duty to relinquish these items upon demand, which he concedes, as well, was made of him, has already been alluded to above. The office equipment was purchased new in 1961, and was not improperly appropriated until September, 1963, almost three years later. Thus, some depreciation must certainly have been suffered, and in the absence of evidence on the question, I think it proper to once again consult the Treasury Guidelines which the parties' own accountants cited to this Court. Those guidelines fix the useful life of office equipment and furniture at 10 years. Consequently, I presume a depreciation of 30% (3 years out of 10) for the appropriated items. The said items totalled $931.35. Defendant should recover the total purchase price of those items after deducting that percentage (30%) to reflect the value of the items at the time Mead was wrongfully deprived of their possession. A similar deduction is appropriate for the automobile, which was purchased for $2,758.17 in November, 1962, approximately 10 months prior to plaintiff's discharge. Applying a useful life of three years to that vehicle, as the guidelines prescribe, a deduction of approximately 27% is to be made to reach the value of which Mead was wrongfully deprived.

As to the charges for freight space which Walter concedes he granted to a company which was supplying certain equipment for the new supermarket, in exchange for a reduction in price of that equipment (Tr. P. 290), plaintiff is unquestionably liable to defendant under § 404 of the *Restatement of Agency*,

Second. That section makes the point that an agent (or employee) is liable to his principal for the value of the use of assets which he improperly devotes to his personal benefit or that of a third person. Meads damages consist of the value of the converted asset which was established by testimony to be approximately $1,200 plus landing fees, but only those attributable to the improper freight – not for the total charges paid on the ship's landing (Def. Ex. V). The total recovery on this counterclaim will be $1,337.95.

THIRD AND SEVENTH COUNTERCLAIMS

Mead denounces Walter for violation of the employment contract clauses prohibiting other employment and competition, pointing to his conduct in constructing the new supermarket. The first clause proscribing other employment reads:

> (2) During the term of this Agreement, Walter shall devote such time and energy to the furtherance of the business of the Employer as its Managing Director of the Shipping Division as may be required and, except in connection with his employment with Walter Quick Freeze Corporation, Walter shall not act in any advisory or other capacity for any individual, firm, association or corporation other than for the first party in any matter or matters without the prior written consent of the employer.

As to this paragraph, Mead must of necessity contend either that plaintiff acted for another firm, which would have to be Pueblo Supermarkets, in constructing the new store, or that the language prohibited him from acting "in any advisory or other capacity" even for himself personally, "in any matter or matters without the prior written consent of the Employer." This latter interpretation strains contractural language to the breaking point, and, in any event, stands in start violation of the principles prohibiting unfair restraint of trade. Such restrictions as may be imposed by contract on the conduct of a party may not be more extensive than necessary to protect the interests of the promisee. They may not impose undue hardship upon the promisor, *Restatement of Contracts*, § 515. Passing on then to the argument that plaintiff acted for Pueblo in this venture, I find the record clearly to the contrary. Walter negotiated the lease of property to erect the building in late 1962 and began

construction immediately thereafter, admittedly without informing defendant. In August, 1963, however, he informed O'Neil, sole stockholder of Mead, of his plans and progress, and offered the entire project to Mead. His bona fide intention to transact a sale with Mead cannot be doubted inasmuch as on the very day he disclosed the project to O'Neil, he signed a memorandum of sale which he interpreted as binding. Moreover, it was not until after his discharge from the shipping division that he sold the market to Pueblo. On these facts, I regard it as impossible to find that Walter was acting for Pueblo in constructing the market, and accordingly, no contractural violation has been established in this respect.

The second paragraph which defendant charges plaintiff violated reads:

> (7) Walter shall not during the term of this Agreement and for a period of two (2) years following the expiration of the term provided for engage directly or indirectly or own an interest in any business which shall be in competition with the shipping business conducted by the Employer or by any subsidiary of the Employer or by any other business in which the Employer may have a controlling or substantial interest.

Walter stoutly maintains, in defense of this charge, that the paragraph prohibits his competition solely with the shipping interests of defendant or its subsidiaries, but not with other kinds of enterprises conducted by either Mead or its associated businesses. The language of the paragraph clearly comports with plaintiff's interpretation as the list of enterprises with which he is forbidden to compete are all introduced with the preposition "by", suggesting that all the ensuing names are intended to modify the preceding phrase "the shipping business conducted". Moreover, such an interpretation is consistent with the general law of agency, which enjoins agent competition with the principal only with regard to transactions connected with the agency, *Restatement of Agency, Second* § 393. Comment (a) provides in part that "an agent can properly act freely on his own account in matters not within the field of his agency...." Walter's agency or employment with Mead was as "Managing Director of the Shipping Division of the Employer." He clearly was not Mead's agent or employee as to his service as general manager of Walter

Quick Freeze, as the parties found it necessary to specially except that employment from the sole employment clause in the contract. Thus, as to non-shipping related activities, the common law of agency would not prohibit plaintiff's pursuit of the supermarket enterprise; and as I read the contract between the parties, its terms require no more.

Based upon the foregoing findings and conclusions, Mead is not entitled to recover on its Third and Seventh Counterclaims as any financial loss which may have resulted from Pueblo Supermarkets entering the St. Thomas market was not attributable to plaintiff's wrongful conduct.

TENTH COUNTERCLAIM

Defendant accuses plaintiff of failing to adequately supervise the care and maintenance of the vessel which was among his primary responsibilities as general manager of the shipping division. Clearly, as Mead's employee, plaintiff was obligated to exercise all reasonable care to preserve the property of his employer, entrusted to him in connection with his employment, *Restatement of Agency, Second* § 402, 422. In support of this allegation, Mead offered the testimony of a surveyor who carefully inspected the Santo Antonio in November, 1963, only two months after Walter's discharge, and found the ship in what he termed "deplorable" and "unsatisfactory" condition (Tr. p. 549). As to the deficiencies which he observed and itemized in his report, defendant's expert estimated that the causal neglect would have to have been at work for four to six months next preceding his survey in order to produce the conditions then observed (Tr. p. 54). This conclusion, however, was disputed by a surveyor called by Walter who had also carefully inspected the Santo Antonio in April, 1963, for official certification by Lloyd's Registry. He testified that as of the date of his inspection, the ship was in good condition. He stated also that the conditions found in the subsequent survey could have occurred after plaintiff's discharge and his release of the vessel (Tr. p. 602). Besides, he identified a number of items in the November survey as common or customary, suggesting that some of the deterioration could not be characterized as resulting from a breach of the duty of reasonable care.

In any event, there is a direct conflict in the opinions of the parties' experts as to the period during which the alleged negligence must have persisted in order to produce the conditions present in November, 1963. Neither witness can be said to have substantially better credibility than his counterpart.[5] Since of necessity defendant must establish plaintiff's responsibility for the damage to its chattel by a preponderance of the evidence before it can recover, I must find and conclude that it has failed to meet its burden and recovery of defendant's Tenth Counterclaim must therefore be denied.

Let judgment enter on the complaint and the counterclaims in accordance with the findings and conclusions hereinabove set forth, including the dismissal of claims as to which failure of proof was conceded. It is my conclusion that plaintiff has prevailed within the meaning of Chapter 45 of Title 5 of the Virgin Islands Code, and is thus entitled to recover costs and reasonable attorney's fees. In view of the contribution toward attorney's fees asked by plaintiff's counsel, the latter is directed to bring his request before the court by appropriate motion with accompanying affidavits and such other documentary or other means which might justify the fee requested.

Dated at Christiansted, St. Croix, U. S. Virgin Islands this 27th day of March, 1973.

ENTER:

/s/ Almeric L. Christian
Chief Judge

ATTEST:

/s/ Leo Penha
Clerk of Court

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[5] As regards broad qualification and experience, I would give the nod, if pressed, to Hallbauer.

Appendix B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 284 - 1963
Action For Debt

AHTO WALTER

Plaintiff

v.

NETHERLANDS MEAD, N.V., ET AL.

Defendants

JUDGMENT

This cause came on for trial on January 10, 1970 through January 13, 1970, and after adjournment, was completed on February 10 and 11, 1970. Plaintiff appeared in person and by counsel, Thomas D. Ireland, Esq. and Charles S. Waggoner II, Esq. Defendant, Netherlands Mead, N.V., appeared by and through its counsel, Bailey, Wood & Rosenberg (William W. Bailey, Esq. and Frederick D. Rosenberg, Esq. of counsel). Defendant William M. O'Neil was earlier dismissed as a defendant pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. Evidence was presented on behalf of the respective parties. The Court having heard the testimony adduced and having heretofore filed its Memorandum Opinion incorporating its findings of fact and conclusions of law herein, and being sufficiently advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff recover nothing on his claim for unpaid salary and bonuses under his ten year Employment Agreement with Defendant from and after his discharge on or about September 10, 1963;

2. That Plaintiff recover from Defendant the sum of $137,514.71 representing his unpaid 26.4% interest in the after tax profits of Defendant under the participating debentures of the Defendant owned by Plaintiff;

Appendix B

3. That Plaintiff recover from Defendant the sum of $6,000.00 representing the face value of the participating debentures of the Defendant owned by Plaintiff;

4. That Plaintiff recover from Defendant the sum of $56,808.89 representing interest accrued from the date the annual payments were due Plaintiff under the participating debentures to March 27, 1973;

5. That Defendant's counterclaims numbered "Second", "Sixth", "Eighth", and "Ninth" are dismissed for failure of proof;

6. That Defendant's counterclaim numbered "First" is allowed to the extent of the vacation pay wrongfully appropriated by Plaintiff in the amount of $2,000.00 and is denied in all other respects;

7. That Defendant's counterclaim numbered "Fourth" for damages for Plaintiff's wrongful withholding of certain records of Defendant is allowed in the amount of $100.00;

8. That Defendant's counterclaim numbered "Fifth" for damages for Plaintiff's wrongful appropriation of certain office equipment, a vehicle belonging to Defendant, and of freight space, is allowed in the amounts of $651.94, $2,013.39 and $1,337.95, respectively;

9. That Defendant's counterclaims numbered "Third" and "Seventh" are denied;

10. That Defendant's counterclaim numbered "Tenth" is denied;

11. That Plaintiff recover from Defendant his costs and attorneys' fees in the amount of $30,000.00. The sums to be recovered by each party against the other as set forth in this Judgment shall bear interest at the rate of six percent (6%) per annum from the date hereof until paid.

Dated at Charlotte Amalie, St. Thomas, U. S. Virgin Islands, this 7th day of January, 1974.

ENTER:
/s/ Almeric L. Christian
Chief Judge

ATTEST:

/s/ Leo Penha
Clerk of the Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1342 and 74-1343

AHTO WALTER

v.

NETHERLANDS MEAD N.V.
(A Netherlands Antilles Corp.)
and W. M. O'NEIL

Netherlands Mead N.V., *Appellant in No. 74-1342*

Ahto Walter, *Appellant in No. 74-1343*

(D. C. Civil No. 284-1963)

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS,
DIVISION OF ST. THOMAS

Argued December 2, 1974

Before SEITZ, *Chief Judge,* and VAN DUSEN and
ROSENN, *Circuit Judges*

Thomas N. Dowd, Esq., David S. Black,
Esq., George R. Clark, Esq., and
William S. D'Amico, Esq., Pierson,
Bell & Dowd, Washington, D.C.,
Attorneys for Netherlands Mead N.V.

Thomas D. Ireland, Esq., St. Thomas,
Virgin Islands,
and
Charles S. Waggoner, II, Esq., St. Thomas,
Virgin Islands,
Attorneys for Ahto Walter

Appendix C

OPINION OF THE COURT

(Filed March 20, 1975)

VAN DUSEN, *Circuit Judge.*

Netherlands Mead N.V. (Mead),[1] the defendant, and Walter, the plaintiff, appeal and cross-appeal the January 7, 1974, judgment of the district court.

This suit resulted from the disintegration of Walter's association with Mead.[2] Prior to that association, Walter and his wife, operating through Walter Quick Freeze Corporation (WQF), were in the retail food business in the Virgin Islands. In 1959, in connection with this business, Walter negotiated the purchase of a cargo ship, the Santo Antonio. Rather than purchase the ship through WQF, however, Walter entered into a complicated arrangement with Mead, a corporation owned and controlled in 1959 by Walter's friend, Reynolds. This arrangement involved four parts. Mead purchased the Santo Antonio. On January 1, 1960, WQF and Mead signed a 10-year agreement which made WQF the preferred customer of Mead's "Shipping Division," i.e., the Santo Antonio, which guaranteed Mead specified minimum gross revenues and which granted to Mead 50% of WQF's net profits. At the same time, Mead and Walter signed a 10-year employment agreement which made Walter a "Managing Director" of Mead's Shipping Division. And Walter purchased eight profit-sharing debentures from Mead, each having a face value of $1,000. Each debenture entitled Walter to 4.4% of the annual net profits of the Shipping Division.

This litigation concerns the employment contract and debentures. Some of the terms of these agreements must

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1. Mead is a Netherlands Antilles corporation. The complaint was dismissed as to O'Neil.

2. Our statement of the facts closely tracks the district court's, but we have omitted material not relevant to these appeals. See *Waler v. Netherlands Mead, N.V.*, 9 V.I. 438 (D. V.I. Civil No. 284-1963, 1973).

be set forth for an understanding of the issues. Clauses 2 and 7 of the employment agreement provided:

> "(2) During the term of this Agreement, Walter shall devote such time and energy to the furtherance of the business of the Employer as its Managing Director of the Shipping Division as may be required and, except in connection with his employment with Walter Quick Freeze Corporation, Walter shall not act in any advisory or other capacity for any individual, firm, association or corporation other than for the first party in any matter or matters without the prior written consent of the employer.
>
> . . .
>
> "(7) Walter shall not during the term of this Agreement and for a period of two (2) years following the expiration of the term provided for engage directly or indirectly or own an interest in any business which shall be in competition with the shipping business conducted by the Employer or by any subsidiary of the Employer or by any other business in which the Employer may have a controlling or substantial interest."

In clause 3, the agreement gave Walter "sole responsibility for the management of the Shipping Division," but directed Walter to "report, as required, to a committee appointed by the Board of Directors of the Employer for its Shipping Division." Clause 6 provided that Walter could be removed only for cause.

The debentures provided, in pertinent part:

> "This Debenture is registered and is nontransferable without the prior written consent of the Managing Director of the Company. In the event the registered holder hereof ceases, for any reason, to be associated with the Shipping Division of the Company either as officer, director or employee or if the registered holder of this Debenture takes any action to sell, assign, con-

vey, transfer or pledge his interest in this Debenture without the prior written consent of the Managing Director of the Company, the Company may, at its option, redeem this Debenture at its face amount plus any interest the holder would be entitled to receive had this Debenture matured at that time.

"Upon sending notice of redemption to the registered holder of this Debenture at his registered address together with payment of such face amount and interest, such holder shall cease to have any rights hereunder."[3]

The district court observed that the "foundation stone of these intricate arrangements was the underlying personal relationship between Reynolds and Walter, between whom there was highest confidence and respect, and who counted on the venture to succeed primarily because of this mutual esteem." 9 V.I. at 447. In 1961 Walter lost control of WQF and was dismissed as its manager in January 1962. By January of 1963, one O'Neil had acquired full ownership of Mead; by May of that year O'Neil controlled WQF as well.

As the ownership of the two companies changed, potential sources of disagreement between Walter and Mead became increasingly active. In November of 1962, and repeatedly thereafter, the directors of Mead requested Walter to transfer to Mead's account in Miami, Florida, all funds in excess of $15,000. which Walter maintained in St. Thomas for the account of the Santo Antonio. Walter initially responded that $15,000. was too little for

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3. Another clause of the debentures concerned the time at which interest payments fell due:

"Payment of such participating interest for the portion of the fiscal year of the Company during which this Debenture matures shall be made within 90 days of such maturity."

Redemption, it appears, requires two steps. First, Mead is required to send notice with payment of the principal and interest accrued through the fiscal year preceding the year during which redemption occurs. Ninety days later Mead is required to tender interest for the fiscal year of redemption.

the operation of the ship, adding that he lacked confidence in the directors of Mead, but finally made a substantial transfer in July of 1963. During the same period, Walter surreptitiously began the construction of a new supermarket. This project was not revealed to O'Neil until August 12, 1963, when Walter attempted to use his interest in the new market to advantage in negotiating his future relations with O'Neil.

Despite Walter's plans for the new market, the negotiations led only to his being discharged as manager of the Shipping Division on or about September 10, 1963. On October 4, 1963, Walter sold the partially completed supermarket to a competitor of WQF, Pueblo Supermarkets. On October 19, 1963, Mead's Managing Director wrote Walter a letter which attempted, pursuant to the above-mentioned clauses of the debenture, a redemption of the six debentures still owned by Walter.[4] The letter recited that Mead was exercising its right to redemption. It stated that $13,412.11 in interest had accrued on the debentures through December 31, 1962, but informed Walter that interest for 1963 could not be computed until Walter relinquished the necessary records. Thus, the total amount which Mead could compute to be due Walter was $19,412.11, representing $6,000. principal plus interest through 1962. However, rather than tendering this full amount, Mead proposed to pay Walter $10,000. upon receipt of the debentures. This latter amount represented the full amount computed, less an amount for which Mead claimed Walter had not properly accounted, conveniently estimated to be $9,412.11. Walter did not surrender the debentures and the $10,000. was never paid.

In December 1963, the new Pueblo market opened across the street from one of the WQF markets. WQF, which had a profit before taxes of $38,371.47 in 1963, lost $296,139.81 in 1964. Mead's 50% interest in WQF's profits suffered accordingly.

4. Walter had sold his other two debentures to O'Neil.

Walter filed this suit (see note 2 above) September 20, 1963, claiming both damages due to wrongful discharge and amounts due on the debentures. Mead counterclaimed for damages resulting from Walter's alleged breaches of clauses 2 and 7 of his employment contract.[5] The case came to trial on January 10, 1970, in the District Court of the Virgin Islands. The district court's judgment was entered on January 7, 1974; it was supported by a memorandum dated March 27, 1973.[6] The court found that Walter's discharge had been proper, but awarded Walter principal and interest on the debentures through their expressed maturity date because it found Mead's attempted redemption of the debentures to have been ineffectual. The court also found that Walter did not breach clauses 2 and 7 of his employment contract when he began construction of the new supermarket. Other parts of the district court's judgment were not challenged on appeal.

I. *The Employment Contract*

Both parties object to the district court's interpretation of the employment contract between Walter and Mead.

Walter contends that the district court erred in holding that his refusal to transfer to Mead the amounts in excess of $15,000. was a sufficient reason for his discharge. He maintains that the law of agency should control his contract with Mead, and advances three arguments for reversal under the agency rubric: first, that the directives to transfer funds were not issued by Walter's "principal;" second, that the directives were unreasonable within the meaning of Restatement (Second) of Agency § 385 (1957); third, that Mead breached the employment contract in making the demand so that any subsequent breach by Walter was excused.

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5. The pleadings contained additional claims which are not subjects of these appeals.

6. The district court thoughtfully accounted for the litigation's longevity. 9 V.I. at 444 n.1.

Appendix C

Although we find the district court's opinion on the question of Walter's discharge to be satisfactory, we will briefly respond to each of the above contentions. With respect to Walter's first argument, the instructions to Walter were issued by Messrs. Lidstone, O'Neil, and Smeets. The district court, with its more thorough knowledge of the complex understandings between the various participants, never doubted that these men had authority to issue the instructions; instead, the court occupied its opinion with the question whether the instructions were merely suggestions. See 9 V.I. at 451-57. But Walter contends that Lidstone, O'Neil and Smeets were at best his equals in Mead, not his superiors. Walter relies, for example, on the fact that both Lidstone and he were called "Managing Directors of the Shipping Division."[7] It is true that the corporate titles for these men do not give a clue as to their comparative responsibilities. But Mead has directed our attention to minutes of a December 30, 1959, meeting of the shareholders of Mead which clarify their relative responsibilities:

> "7. Proposal to approve the nomination by the Management of Mr. Ahto Walter, Mr. Ian Major, Mr. Richard J. Reynolds and Herrick K. Lidstone as Special Attorneys of the company in charge of the Shipping Division of the company referred to above, Mr. Walter, Mr. Reynolds and Mr. Lidstone each with the title of 'Managing Director of the Shipping Division of the Company' and Mr. Major with the title of 'Director of the Shipping Division of the Company', with the capacity in either Mr. Walter or Mr. Major to represent the Company jointly, judicially and extra judicially, in all matters concerning said Shipping Division, but only with the approval of either Mr.

7. Actually, Walter claims that they were both "special deputy managing directors." Appellee's Brief at 23. This designation was taken from Mr. Lidstone's testimony regarding a meeting of Mead's shareholders, the minutes of which appear to be Defendant's Exhibit B. Those minutes reveal the actual titles to have been as stated in the text.

> Reynolds or Mr. Lidstone, and with the capacity in Mr. Walter to represent the Company singly, judicially and extra judicially, in all matters concerning the routine, day-to-day affairs of the Shipping Division, such as from the day of this meeting.
>
> . . .
>
> "These proposals put to the vote, are unanimously adopted by the meeting."[8]

It was at this meeting that Mead's shareholders ratified the contracts between WQF, Walter, and Mead. These minutes are, therefore, important evidence on the parties' intent in making Walter a "Managing Director" of the Shipping Division, and in giving him "sole responsibility" for its operation. A fair reading of the minutes suggests that decisions regarding the overall management of the Shipping Division were made subject to Mr. Lidstone's approval, but the implementation of such decisions was left to Walter's sole discretion. The total amount of cash available for immediate withdrawal by Walter would seem to fall into the former category; by contrast, decisions regarding the proper disbursement of the cash for the efficient operation of the ship would be left entirely to Walter. We conclude, therefore, that at least Lidstone[9] was empowered to direct Walter to transfer funds in excess of $15,000.[10]

Walter's second and third arguments have also failed to persuade us. Restatement (Second) of Agency § 385 (1957)[11] provides:

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8. These minutes were entered in the record as Defendant's Exhibit B.

9. Since we hold that Lidstone was empowered to direct the transfer of funds, we need not decide whether O'Neil and Smeets were also so empowered.

10. The minutes indicate that Reynolds shared Lidstone's power, but there is no indication that Reynolds objected to Lidestone's demand. It will be recalled that Reynolds was losing control of Mead during the time the directions to Walter were made; it is possible, therefore, that he was no longer in a position to object.

11. Where available, the Restatements have been adopted as the law of the Virgin Islands. See 1 V.I.C. § 4 (1967). On the conflict of laws issue, see note 14 *infra*.

> "(1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.
>
> "(2) Unless he is privileged to protect his own or another's interests, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given."

Comment "a" to subsection (1) explains in part:

> "The agent cannot properly refuse to obey on the ground that the obedience will be injurious to the principal's affairs, unless the agent's compensation is dependent upon the execution of the undertaking or unless it has been agreed that the agent's discretion shall control."

In Walter's mind, he refused to obey the instructions to transfer funds in order to protect the interests of the Shipping Division, which was entrusted to him, and on the success of which his participating interest in the debentures depended. For these reasons, he believes that the above sentence in comment "a" speaks directly to his situation. We cannot agree. Since we have found that the amount of cash at Walter's disposal was, by agreement, left to the approval of Lidstone, we hold that the parties had "otherwise agreed" for purposes of § 385, so that their contract, and not comment "a," controls. For the same reason, Mead did not breach its employment agreement with Walter when it demanded the transfer of funds. Having found that Mead's requests for the funds were authorized and reasonable, we must conclude that the district court correctly held that Mead was privileged to discharge Walter upon his refusal to transfer the funds. See Restatement (Second) of Agency § 409(1) (1957).

Appendix C

We turn now to Mead's claim that the district court should have found that Walter violated clauses 2 and 7 of his agreement with Mead when he began constructing the new supermarket. Mead argues, in effect, that these clauses were intended to embody Walter's duty of loyalty to Mead. Applying standard principles concerning the duty of loyalty, Mead contends that Walter should be required to account for the profits Mead lost as a result of the opening of the Pueblo supermarket.

The problem with Mead's analysis is that Walter's actions slip between clauses 2 and 7. Clause 2 does not prevent Walter from acting in his own interest, but only from working for others.[12] Clause 7 by its syntax prohibits competition only with the shipping business of Mead. Although the WQF-Mead contract linked the fortunes of the two companies, Mead also did shipping for other customers. It is, therefore, not appropriate to equate competition with WQF with competition with Mead's Shipping Division for purposes of clause 7. We find that Walter's conduct did not violate the express employment contract.

Even if we assume, without deciding, that Walter's conduct would violate a duty of loyalty Walter owed to the corporation as its officer[13] on common law principles,[14]

12. The district court specifically found that Walter was not acting for Pueblo in constructing the new supermarket. 9 V.I. at 470. Although Mead is able to point to a damaging statement made by Walter during his testimony, Reply Brief at 6, which Walter has disputed but failed to correct under F.R. App. P. 10(e), we are not able to say that the court's finding was clearly erroneous, in light of the entire record.

13. In general, an officer who competes with his own company will be liable in damages. *Abbott Redmont Thinlite Co. v. Redmont*, 475 F.2d 85, 88-89 (2d Cir. 1973). See *Lincoln Stores v. Grant*, 309 Mass. 417, 34 N.E.2d 704 (1941).

Walter's conduct may fall outside the rule, however. The new supermarket was not a potential competitor of Walter's employer, Mead, but only of Mead's trading partner, WQF. And Walter was not hired as an officer of Mead, nor was he one of Mead's directors; rather, he was hired as a "Managing Director" of Mead's "Shipping Division." Had the corporation wished unequivocally to saddle Walter with the duty of loyalty, they could have made him an officer, but they chose not to do so.

14. Presumably, the law of the Netherlands Antilles should govern the duties owed Mead by its officers and directors. However, Mead has made no effort to prove Netherlands Antilles law. F.R. Civ. P. 44.1. We shall therefore assume that the law of the Netherlands Antilles is consistent with the

there remains the question whether the duty of loyalty was not subject to contractual modification in this very close corporation.[15] We find that it was. At the time the employment contract was made, Mead was owned by Walter's friend, Reynolds. O'Neil, who had stepped into Reynolds' shoes by 1963, was surely apprised of the terms of Walter's contract. Whereas strong principles of loyalty embody society's ordinary expectations for the conduct of fiduciaries, such principles should not prevent the shareholders of this close corporation, Reynolds and later O'Neil,[16] from entering into an agreement which, by clauses 2 and 7, restricted Walter's duty of loyalty.[17] We therefore affirm

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14. (Cont'd.)

law of the forum. *Leary v. Gledhill*, 8 N.J. 260, 267, 84 A.2d 725, 728 (1951); B. Currie, *Selected Essays on the Conflict of Laws* 46-49 (1963). Since we have not found in the Virgin Islands Code any statutory regulation of the duty of loyalty of corporate officers and directors, and since there is no Restatement on the subject, common law principles control. 1 V.I.C. §4 (1967).

15. Mead cites several cases concerning the duty owed by an employee or agent to his employer or principal. For the reasons given above at note 14, the law of the Virgin Islands controls this issue; 1 V.I.C. §4 directs us in this instance to Restatement (Second) of Agency (1957). Relevant portions of that Restatement provide:

"§389. Acting as Adverse Party without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge."

"§393. Competition as to Subject Matter of Agency

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency."

The Restatement thus subjects an agent's duty of loyalty to contractual modification. This is consistent with the cases cited by Mead, which did not contain a contractual provision modifying the employee's or agent's duty of loyalty. See *Community Counseling Service, Inc. v. Reilly*, 317 F.2d 239 (4th Cir. 1963) (implied duty of loyalty); *NLRB v. Montgomery Ward Co.*, 157 F.2d 486 (8th Cir. 1946) (implied duty of faithfulness); *Commonwealth Finance Corp. v. McHarg*, 282 F. 560 (2d Cir. 1922) (implied duty of loyalty).

16. The record evidence indicates that all shares of Mead were owned by Reynolds or O'Neil from 1959 through 1963. And it is undisputed that in 1959, when the employment contract with Walter was made, Reynolds was the sole shareholder and in 1963, when suit was filed, O'Neil was the sole shareholder, so that neither of them can complain of terms in the contract with Walter.

17. "If all the stockholders of a corporation consent, and it is not detrimental to creditors, officers may appropriate corporate assets. It follows that if there are no stockholders except the directors and officers, the

the district court's holding that Walter did not breach these clauses when he began construction of the new supermarket.[18]

The product of the district court's resolution of these issues is that neither party will recover a large expectation interest under the employment contract. This aptly reflects the impasse which relations between Walter and Mead reached during 1962 and 1963. The mutual trust necessary for their continuing contractual cooperation had vanished; in retrospect, we can see that the complete failure of their arrangement was inevitable. Were we to place the blame caused by that failure on one of the parties by granting the other's expectation interest, we would distort their agreement and the mutual failure of their trust.

II. *The Debentures*

The district court found that Mead's deduction of $9,412.11 from the amount it had computed to be due Walter through 1962 was not authorized under the terms of the debentures set forth above. It held that the attempted redemption of the debentures was, therefore, ineffectual, so that Walter's rights continued through January 1, 1970, the express maturity date of the debentures.

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17. (Cont'd.)

latter may, of course, by unanimous consent, give away corporate property, where the rights of creditors are not impaired."

3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 1104 (Rev. ed. 1965). This principle was adopted in *Stony Brook Lumber Co. v. Blackman*, 286 Pa. 305, 309, 133 A. 556, 557 (1926), which was recently recognized in *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1005 (3d Cir. 1973) (rights of creditors were impaired). See also *Moran v. Edison*, 493 F.2d 400, 405 (3d Cir. 1974) ("[I]n the case of a closely held corporation . . . where the directors are also the officers and stockholders, self-dealing on salary questions may be inevitable as a practical matter."); *Clark v. Dodge*, 269 N.Y. 410, 199 N.E. 641 (1936) (enforcement of agreement among sole shareholders-directors to vote for certain people as officers, which did not affect the public, was permissible despite statutory policy to the contrary).

18. In part, the district court denied Mead relief because it found that clause 2 was an unfair restraint of trade. 9 V.I. at 469. Because we do not believe that Walter's conduct was covered by clause 2, we need not consider the restraint of trade holding.

Had the redemption been effectual, Walter would have recovered something over $20,000.; instead, he recovered $137,514.71 in interest on the debentures, $6,000. principal, and $56,808.89 accrued interest from the dates on which the annual interest payments were due through March 27, 1973, the date of the district court's memorandum.

Mead objects to this result on several grounds. It first argues that its deduction of the $9,412.11 was within the terms of the debentures, and therefore did not defeat its attempted redemption. We agree with the district court that the deduction was improper. However, Mead also contends that any defect which the court finds in the manner of its attempted redemption should not result in liability for interest through the express maturity of the debentures. We have concluded that such contention must be granted and the district court judgment must be reversed on this issue. On this record, Walter is estopped from raising any objection to the attempted redemption other than the one which he raised in his original complaint and which he maintained consistently thereafter, namely that his discharge had been improper so that Mead had no option to redeem the debentures under the redemption clause set forth above. By including this redemption issue in the complaint, Walter was the first party to raise it.

Mead contends, and Walter does not deny, that Walter's initial written statement of position concerning the attempted redemption was his complaint in the district court. Walter's original complaint stated a cause of action for improper discharge and predicated his right to participating interest through the debentures' maturity date on the ground that his employment had been wrongfully terminated. The complaint proceeds as if Mead had already attempted to redeem the debentures, even though the complaint was filed nearly a month before Mead sent its October 19, 1963, letter attempting redemption. One must infer that, on the basis of their strained relationships, Walter anticipated that Mead would exercise its option to

redeem the debentures upon Walter's discharge, and that Walter was eager to record his claim on the debentures as part and parcel of his claim for improper discharge. Coming as it did before Mead's letter, the complaint nowhere objected to the technical defects in the October 19, 1963, letter which Walter now asserts as having made that letter ineffectual to redeem the debentures.[19]

On receipt of the October 19, 1963, letter, Walter did not amend his complaint to include his technical objections to the attempted redemption, nor did he take any other action calculated to apprise Mead of these objections. Indeed, the record indicates that Walter never thought of such objections until their possibility was raised by the trial judge near the end of the trial, as noted below. The pre-trial materials, which, of course, extend over a six-year period during which interest on the debentures was constantly accruing, were entirely silent on the subject until

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19. Relevant portions of Walter's September 20, 1963, complaint read as follows:

> "COMES Now the plaintiff Ahto Walter, by and through his attorneys, Maas & Ireland, Esqs., and complaining of the defendant does allege and state as follows:
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> . . .
>
> "12) . . . The purported removal of the plaintiff from office as Managing Director, and from 'all association or connection with Netherlands Mead N.V.' appears to be directly calculated and intended to improperly and fraudulently deprive plaintiff of debenture income to which he is entitled under the terms of the said debentures.
>
> . . .
>
> "14) Further, the defendant is entitled to the protection of this Court in connection with the income due to be paid to him on the debentures he holds in the Shipping Division of the defendant. By the action of defendant the plaintiff is now unable to obtain correct information and figures of the income developing in the future from the Shipping Division of the defendant. The wrongful and fraudulent actions of the defendant have been directed toward the removal of the plaintiff from the employment for which he is eminently qualified and for which he is entitled to be reimbursed to the full amount of salary, bonus and debentures provisions. Under the terms of the debentures, plaintiff should be paid the sum of $158,400.00 for his participating interest in the net income of defendant due him for the years 1963 through 1969; . . . ."

In view of these parts of Walter's complaint, we cannot understand the basis for the dissent's statement that "Mead, not Walter, brought this issue into the case." Concurring and Dissenting Opinion at 2.

plaintiff's October 1969 Statement[20] (see below) was filed. It is clear, therefore, that Walter's objection to the attempted redemption had not changed during this period from that of his original complaint. His "Statement of Factual and Legal Questions Involved," filed October 20, 1969, restated exactly the same position, that he was entitled to recover on the debentures because his discharge had been improper, as follows:

"PLAINTIFF'S STATEMENT OF FACTUAL AND LEGAL QUESTIONS INVOLVED

"We herewith consolidate for the Court all of the factual evidence and outline the state of the case and the legal issues involved. . . .

. . .

"II. THE ISSUES

"1. With respect to the non-competition provisions of the Employment Contract of January 1, 1960, are the provisions unfair, unreasonable, and unenforceable? Are they greater than required for the protection of the employer defendant; do they impose undue hardship upon the plaintiff employee; are they therefore illegal and unenforceable?

"2. Was Plaintiff improperly discharged from his position as Manager of the Shipping Division of Netherlands Mead?

"3. *If he was improperly discharged, what is he entitled to under the terms of the debentures* and the terms of the Employment Contract?

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20. The only non-Rule 16 document filed prior to trial we have found which dealt with the debentures was a Motion and Accompanying Affidavit, Document 47, filed by Walter on November 16, 1967. It sought access to Mead's records for the purpose of calculating Walter's participating interest on the debentures and does not reflect any alteration in Walter's theory of recovery on the debentures.

"4. If he was properly discharged, is Netherlands Mead entitled to relief under any of its counterclaims?" (Emphasis supplied.) [20a]

Document 66 at 1, 6-7. The theory on which Walter now relies, that the October 19, 1963, letter failed to comply with the method of redemption provided in the debentures, was first suggested by the trial judge, *sua sponte*, on January 21, 1970, after the debentures had matured (on January 1, 1970) and after plaintiff had rested his case (N.T. 671): [21]

"THE COURT: The next question: are you suggesting on this motion that the Court dismiss Mr. Walter's complaint in its entirety or partially?

"MR. ROSENBERG: Partially. Do you want me to elucidate on that?

"THE COURT: Well, the part that you don't want—that you are not suggesting a dismissal on, I think, occurs to me, that's why.

"MR. ROSENBERG: Well, he is entitled, as we suggest in our pleadings, I believe, to the earnings of the debentures prior to his discharge.

20a. Defendant's statement of question presented (Doc. 84) relies on the existence of sufficient cause for discharge of plaintiff by stating this question, with authorities supporting the right to defend on the facts of this case:

"QUESTION PRESENTED

"May an employer who is sued for breach of an employment contract defend on the ground that there existed, at the time of discharge, sufficient cause for discharge, although he was, at the time, ignorant of the facts?"

21. One phrase in Walter's opening statement to the court may appear to raise as an issue the manner of attempted redemption:

"We say that—and I feel that the evidence will show—that he was arbitrarily fired in violation of this contract; that his debentures were not properly redeemed under the very provisions of those debentures."

N.T. 5. However, read in the light of the next sentence, "I say that the evidence will show that Ahto Walter can answer every one of these allegations that have been set forth in the answer and in the counterclaim and answer them properly and prove to you that they are not a basis for firing him for cause under the terms of the contract," N.T. 5-6, and Walter's pre-trial statement of issues, it is clear that by the "provisions of those debentures," Walter meant the condition of proper discharge to Mead's option to redeem.

"THE COURT: Now, let's get to that. If we agree that there were grounds for his discharge, it is clear that the debentures say that when he ceases to be an employee his right to hold them ceases also; isn't that correct?

"MR. ROSENBERG: That's right.

"THE COURT: Now, the debentures, however, provided how they should be redeemed. If they properly discharged him, did that relieve them of the obligation to redeem the debentures in the manner stated on the face of them?"

N.T. 710-11. The novelty of this theory was evident when, shortly after the above exchange, the district court had to correct Walter's attorney, Mr. Ireland, who still believed that Walter's claim on the debentures depended on proving that he had been improperly discharged:

"THE COURT: Please. And may I ask Mr. Ireland a question? I meant to ask it and forgot. Do you agree with Mr. Rosenberg that if there was in fact good cause to discharge Mr. Walter the whole case falls?

"MR. IRELAND: The whole case falls.

"THE COURT: Other than as to the debentures, if there is a finding that he was properly discharged, do you agree that that ends the plaintiff's case, except in this area we are discussing now?"

N.T. 713.[22]

Mead contends that, in reliance on the theory first seen in Walter's complaint and maintained by Walter for six years until it was finally supplanted at trial at the district

22. Even after the suggestion of the trial judge at N.T. 713, plaintiff's counsel did not clearly state that he agreed with such suggestion (see N.T. 713-17).

court's suggestion, it did not correct the alleged deficiencies in its tender by depositing into court the amount Walter claimed Mead owed him. Instead, Mead assumed that its obligations to Walter on the debentures would stand or fall depending on whether the court found that its discharge of Walter had been justified. A venerable case in this Circuit is directly on point:

> "Accordingly, when a party, with full knowledge of the facts . . . has selected and given one of several available reasons for his refusal to perform his contract or discharge his duty and after suit changes his position and seeks to rely upon the others, federal courts in this circuit, looking to the reason of the rule and keeping in mind the distinction between waiver and estoppel, . . . examine the record to find whether it appears that the party has misled his adversary or induced him to alter his position to his prejudice or has himself reaped an advantage by failing seasonably to assert the defense subsequently made—in other words, whether the facts raise an estoppel. . . ."

Second National Bank of Allegheny v. Lash Corp., 299 F. 371, 372 (3d Cir. 1924) (citations omitted). See also *Ohio & Mississippi Ry. v. McCarthy*, 96 U.S. 258, 268 (1878).

Mead's argument is believable. The October 19, 1963, letter was not so grossly defective that Mead's reliance on it can be considered unreasonable, particularly in light of the assumption both parties shared until more than half way through the trial that Mead would be liable on the debentures through their express maturity date only if the court found that Walter had been improperly discharged. And it is difficult to believe that a profitable[23] corporation, had it been apprised that Walter objected to the manner of redemption, would not have eliminated the risk of a tenfold increase in its liability by making a corrected tender

23. According to Walter's (Plaintiff's) Exhibit No. 27, Mead showed a profit during the years 1960-1969, inclusive.

into court. Walter's only counter to this argument is that paragraph 15 of Mead's Answer filed on May 7, 1965, shows that Mead was on notice of Walter's objections to the manner of redemption.[24] But paragraph 15, copied in the margin,[25] does not argue that the attempted redemption was in formal compliance with the terms of the debentures, as it would have if Mead thought Walter's objection went to the

24. Actually, Walter relies on Mead's Amended Answer, which was filed on July 7, 1969. However, paragraph 15 of the original Answer is identical to paragraph 15 of the Amended Answer.

25. "As a First Partial Defense

"Fifteenth: Insofar as the complaint herein is based on plaintiff's alleged right under the 'Shipping Division Participating Debentures' owned by plaintiff (paragraphs '6', '14', and '16' of the complaint), plaintiff is estopped from asserting any claim thereunder because:

(a) By letter dated October 19, 1963 (a copy of which is annexed hereto as Exhibit 2 and made a part hereof), defendant Mead notified plaintiff of its election to redeem plaintiff's six (6) 'Shipping Division Participating Debentures' and tendered payment in full to December 31, 1962 for such Debentures. Plaintiff, having failed to deliver his said six (6) Debentures to defendant, has waived his right to demand payment therefore. Nevertheless, defendant Mead, having elected to redeem plaintiff's said Debentures, all as provided in said Debentures, remains ready, willing and able to make the payment tendered in defendant Mead's October 19, 1963 letter.

(b) Plaintiff, having repeatedly and improperly failed to deliver to defendant Mead or to its accountants, Messrs. Klynveld, Kraayenhof & Co., Curacao, Netherlands Antilles, the books of accounts and statement of receipts and expenses for the period commencing January 1, 1963 to and including the date of termination of plaintiff's employment, has made it impossible to compute the profits and/or losses for such period; and, therefore, plaintiff is estopped from claiming any payment for any period after December 31, 1962 with respect to the six (6) 'Shipping Division Participating Debentures' held by plaintiff.

(c) As a result of the termination of plaintiff's association with defendant Mead on September 10, 1963 and as a result of defendant Mead's election as aforesaid, to redeem plaintiff's 'Shipping Division Participating Debentures', plaintiff has failed to state a claim against defendant Mead upon which relief can be granted with respect to his participation in the profits earned by the Shipping Division after October 19, 1963.

(d) If plaintiff is entitled to recover from defendant Mead with respect to his six (6) 'Shipping Division Participating Debentures', his right to recover is limited to $19,412.11, the amount of principal and profits with respect to said six (6) Debentures as computed by defendant Mead's regularly employed accountants, as provided in said Debentures, for the period to December 31, 1962."

We agree with the concurring and dissenting opinion that Mead had the burden of proving redemption as an affirmative defense. Our point, though, is that Walter's written statements estop him from litigating the question whether the attempted redemption was in formal compliance with the debentures' redemption procedure.

manner of redemption. Although it is not explicit, paragraph 15 appears to reflect Mead's continuing belief that its obligations on the debentures had ceased as of December 31, 1962. This belief is reflected in Mead's recitations that it had elected to redeem the debentures after Walter had been properly discharged, and that Walter had failed to supply information necessary to compute interest due between December 31, 1962, and the date of redemption.[26]

For these reasons, we have concluded that the record[27] supports Mead's assertion of an estoppel.[28] The estoppel

26. Mead's payment of interest on the debentures was excused to the extent that Walter did not supply the necessary accounting information. Comment "c" to Restatement of Contracts § 395 (1932). However, as noted above, we agree with the district court that the same principle does not excuse Mead's deduction of $9,412.11, for which it claimed Walter had not satisfactorily accounted. The $9,412.11 was an amount Mead claimed Walter owed it (unless he could account for it satisfactorily), which may not be deducted from a valid tender. 15 Williston on Contracts § 1810 (3d ed. 1972).

27. In reaching this conclusion, it has been necessary to reject a possible interpretation of one phrase in the district court's findings of fact which we have decided would be clearly erroneous. The district court said, "Walter, contending that the attempted redemption was ineffectual, declined to accept tender and eventually commenced this suit." 9 V.I. at 450. The evidence in the record supports that finding only insofar as it is based on Walter's contention that the attempted redemption was ineffectual because he had been improperly discharged, not because of any objection to the manner of redemption. This is, of course, consistent with our holding.

28. Due to the steady accrual of interest from September 1963, when the Complaint was filed, the estoppel we find would have arisen with equal force if Walter's statements had been made to Mead out of court. The estoppel found in this case arises from statements in the pleadings only because, after the collapse of their relationship, Walter's communications to Mead were solely through the medium of papers filed in this district court action. Since the estoppel did not arise from the complaint as a pleading, but only from the complaint as a communication of Walter's position to Mead, we find the dissenting opinion's reliance on the Federal Rules of Civil Procedure to be misplaced. This is especially true in a case such as this, where the defense normally includible in the answer has been anticipated in the complaint. See notes 19 and 25 above.

The plaintiff's statement of issues (pages 15-16 above) was submitted pursuant to paragraph 4 of the district court's May 19, 1969, Pre-Trial Order. The plaintiff should, therefore, have been limited to the issues included in his statement, absent an order of the district court allowing the plaintiff to amend his statement. See *Ely v. Reading Co.*, 424 F.2d 758, 763-64 (3d Cir. 1970); *Southard v. Independent Towing Co.*, 454 F.2d 1115 (3d Cir. 1971); *Payne v. S.S. Nabob*, 302 F.2d 803 (3d Cir. 1962); F.R. Civ. P. 16. Although the defendant made no objection based on the plaintiff's pre-trial statement at the time the trial judge's new theory was raised, his counsel stated that he disagreed with the trial judge (N.T. 715-16). In *Ely, supra*, this court used this language at pages 763-64:

> "One of the main purposes of the pretrial conference is to formulate the issues to be litigated to aid the parties in preparation for trial. *If*

arose as the result of Walter's position, first stated in his September 20, 1963, complaint and maintained consistently thereafter, until the suggestion of the district court itself on January 21, 1970, that Walter's objection to the attempted redemption was that he had been improperly discharged. Since we have held that Mead's attempted redemption of the debentures on October 19, 1963, was ineffectual, we hold that Walter is entitled to interest on the debentures through September 20, 1963, together with interest accrued through the date of judgment. So much of the district court's judgment as is inconsistent with this holding will be reversed.

III. *Attorney Fees*

The district court granted Walter, as the prevailing party, $30,000. in attorney fees. It relied on 5 V.I.C. ch. 45 (1967), which at § 541 provides:

"§ 541. Costs defined

(a) Costs which may be allowed in a civil action include:

. . .

(6) Attorney's fees as provided in subsection (b) of this section.

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28. (Cont'd.)

counsel are permitted to change the positions taken at pretrial obviously the effectiveness of this procedure is destroyed. For this reason the pretrial order is generally binding on the parties. It cannot be modified without the permission of the court and a showing of manifest injustice. The decision of whether or not to permit a change is within the discretion of the trial judge. Appellate interference with this discretion should be kept at a minimum. It should only be exercised where there is a clear abuse of discretion."

(Emphasis added and footnotes omitted.) It is noted that no order was entered by the district court expanding the issues to be considered on the ground of "manifest injustice" or any other ground. In view of the accrual of interest from 1963 to the present, it seems clear that there is more injustice to the defendant, who failed to make payment in reliance on a proper discharge, than to the plaintiff, whom the trial judge made the beneficiary of a suggestion he advanced first near the end of trial.

> (b) The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorneys fees in maintaining the action or defenses thereto."

Since our holding on the debenture issue substantially diminishes Walter's recovery, we must vacate the district court's grant of attorney fees and remand so that the district court can decide, in its discretion under § 541(b), whether Walter should still recover attorney fees.

Even if we had affirmed on the debentures, we would feel constrained to vacate the district court's grant of attorney fees, since the court appears not to have complied with the standards for taxing attorney fees which have been set forth in recent opinions of this Circuit. The applicable principles were recently collected and analyzed by this court in *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp.*, 487 F.2d 161 (3d Cir. 1973), and *Estien v. Christian*, 507 F.2d 61 (3d Cir. 1975). If on remand the district court decides that Walter is still the prevailing party for purposes of 5 V.I.C. § 541(b), it should compute the attorney fees due Walter on the basis of the criteria stated in *Lindy* and reaffirmed in *Estien*.[29]

IV. *Conclusion*

The district court's judgment will be reversed with respect to Walter's recovery on the debentures, with instructions to enter judgment for Walter in the debentures' principal amount ($6000.00), plus participating interest ac-

29. In this case it would be particularly important to determine what portion of Walter's attorney's time was applied to the claims on which Walter has ultimately prevailed, and to grant only so much of the fees thus computed as are fair in relation to the amount of Walter's recovery on these claims.

We note that since *Lindy* and *Estien* were decided October 31, 1973, and January 2, 1975, respectively, the district court did not have the benefit of these decisions when it wrote its memorandum in March 1973.

crued through September 20, 1963, plus interest on such participating interest amounts accrued from the dates the annual payments were due through the date of entry of the new district court judgment on the debentures. The district court's judgment with respect to attorney fees will be vacated and remanded for further proceedings consistent with the criteria set forth under heading III above. In all other respects, the judgment of the district court will be affirmed.

SEITZ, *Chief Judge,* concurring in part and dissenting in part.

I concur in the court's disposition of the issues pertaining to plaintiff's employment contract. I disagree with its reversal of the district court's ruling on the debenture issue.

The debenture issue had a bizarre procedural and substantive career in the district court. A recital of its unfortunately protracted history is necessary to an understanding of my position.

On September 20, 1963, Walter filed his complaint. He sought, inter alia, recovery of the face amount of the debentures for their full term (until 1970) plus interest on the theory that he had been invalidly discharged and thus deprived of the opportunity to realize the full benefit of the debentures.

On October 19, 1963, Mead sent Walter a notice of redemption.

On May 7, 1965, Mead filed its answer to the complaint and asserted "As a First Partial Defense" that Walter was estopped from asserting any claim under the debentures after the date of its redemption letter of October 19, 1963.

Whether this subject matter was properly labeled an estoppel, we need not decide. Under the terms of the Agreement, if there was a valid redemption attempt, it certainly was a defense to Walter's debenture claim for the period beyond the redemption date, assuming a legal discharge. This possible partial defense to the complaint was, of course, based on action taken by Mead after the filing of the complaint. As new defense matter to which no responsive pleading was required, it had to be taken as denied. F.R. Civ. P. 8(d). The same partial defense was repeated in Mead's amended answer filed in 1969.

The majority opinion points out that Walter did not raise the formal insufficiency of the redemption offer in his pre-trial statement. But neither did Mead mention the redemption defense in its pre-trial statement of "Questions Presented" filed in January 1970. More to the point, Mead had the burden of proving its partial defense that there had been a valid redemption. Mead, not Walter brought this issue into the case. The majority would apparently thrust this burden on Walter by requiring him to do what the Federal Rules do not require of him, viz., file an amended pleading challenging the validity of the redemption on the ground that there was a formally defective tender.

A reading of the trial transcript shows an understandable emphasis on the issue of the validity of Walter's discharge. It is understandable because this was the only issue presented by Walter and Mead did not shoulder its burden with respect to the partial defense of redemption.

Under my analysis of the case, particularly assuming a proper discharge, redemption was a matter of defense. In these circumstances, I do not understand how the majority can use the record facts here to construct an estoppel against Walter on this issue. Absent such estoppel all agree that the redemption was invalid. Given the majority's unwillingness to allow Walter to make a claim under the debentures in this action, the court should at

least conclude that the validity of the attempted redemption was not before the district court in this action.

The majority construes a statement made by plaintiff's counsel in his opening address to indicate that counsel at that time did not intend to contest the attempted redemption on any grounds other than wrongful discharge —a meaning which is not clear from the plain language of the statement. It further finds in a brief exchange on the record between the district judge and counsel for the plaintiff what it deems to be conclusive evidence that plaintiff was not aware of the possibility of attacking defendants' attempted redemption until such a course was suggested to plaintiff late in the trial.

I believe that the majority has taken the statements upon which it relies out of context and has based its conclusions on a tenuous and conjectural reading of the language. At worst either passage relied upon could be read to sustain an inference exactly opposite to that which the majority seeks to draw.[1] At best, the quoted passages

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1. The portion of plaintiff's opening statement quoted by the majority is as follows:

> We say that—and I feel that the evidence will show—that he was arbitrarily fired in violation of this contract; that his debentures were not properly redeemed under the very provisions of those debentures.

I find this language ambiguous, and nothing in preceding or subsequent portions of the pretrial statement elucidate exactly how plaintiff proposed to show that the debentures had not been properly redeemed. However, inasmuch as defendants brought the redemption issue into controversy, it could well be that counsel was merely indicating that plaintiff was prepared to rebut defendants' affirmative defense.

A continuation of the portion of the exchange between defense counsel and the court quoted by the majority follows. I find it to demonstrate that defendants understood and intended the redemption issue to be defensive matter about which they had yet to make an offer of proof.

> THE COURT: Now, the debentures, however, provided how they should be redeemed. If they properly discharged him, did that relieve them of the obligation to redeem the debentures in the manner stated on the face of them?
>
> MR. ROSENBERG: Well, I submit, your Honor, they made an attempt to redeem them. Of course, this is not yet all fully in the record. That is still to come out on our side, how this is done.
>
> THE COURT: Well, then if I take that evidence in the light most favorable to him, then he would have made out a case which would cause us to go forward as to more than just debenture profits up to '63.

merely show that plaintiff did not in fact raise objections to the redemption attempt. But in my view, the burden of raising this defensive matter was not on the plaintiff.

Whatever value the quoted portions of the transcripts may have to demonstrate that plaintiff did not assert imperfections in the "tender," they do not help to sustain the majority's estoppel theory. The debentures actually came due on January 1, 1970, eighteen days before the commencement of trial in this case. It therefore is inappropriate to imply that statements or representations made by plaintiff during the trial mislead defendants, preventing them from protecting their interests, since there was no act that defendants could then perform that would have prevented the debentures, retroactively, from reaching fruition.

The majority asserts that plaintiff never amended his complaint nor undertook any action to inform defendants of his technical objections to the tender. But the majority cites no authority for the proposition that plaintiff had a duty to amend his complaint.

Nor is Second National Bank v. Lash Corp., 299 F. 371 (3d Cir. 1924), controlling here. The majority relies on

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1. (Cont'd.)

MR. ROSENBERG: I think there is evidence in the record that an attempt was made to redeem them.

THE COURT: I know, but not in accordance with the terms of the debentures.

MR. ROSENBERG: Well, I'm not sure that counsel has spelled that out and proved that it was done.

THE COURT: He doesn't have to, for the reason the letter—there is a letter from somebody telling him we have computed thus and so and if you will give your debentures to somebody—

MR. ROSENBERG: Yes.

THE COURT: —we will give you this amount of dollars which represents what the debentures are now worth, less what we estimate you owe us.

MR. IRELAND [Walter's counsel]: It's Smeet's letter.

THE COURT: That's the letter, and I'm asking you the fact if we concede that they had good cause to discharge him did that relieve them of the obligation to take into the debentures in the manner in which it says it was to be taken in?

Lash for the proposition that plaintiff is estopped from now asserting that the debentures were never properly redeemed since he never put defendants on notice that their supposed tender was imperfect at the time it was made.

But *Lash* is clearly distinguishable. *Lash* applied the estoppel principle to prevent the use of contract defenses available before suit but not cited in the answer, preventing what was essentially a deceptive trial tactic. The case involved a suit against one party to a contract who was seeking to evade his contractual obligation which, because of market fluctuations, had become disadvantageous to him. The contract sued under was bilateral, containing mutual promises—by the plaintiff, that he would tender goods in accordance with the terms and conditions of the contract, and by the defendant, that he would accept goods properly tendered and make payment for them. The plaintiff tendered substantial performance. The defendant rejected the tender and affirmatively represented that there was only one basis for his rejection. He was subsequently prevented from introducing for the first time at trial his other objections to the tender.

The case at bar, however, differs substantially. Here, the defective tender ground was based on an act—the tender—that had not yet occurred when plaintiff filed his complaint; there is therefore no basis for concluding that plaintiff withheld from his complaint available grounds for an attack on the tender in order to deceive defendants. Here the party against whom the majority applies the estoppel principle is seeking to enforce—rather than to evade—a contractual obligation, to gain no more than the benefits that flow by operation of that contract.

Here also the debenture agreement required merely unilateral acts: once Walter's employment was terminated Mead need only have sent notice of redemption *together with* payment of the amount due under the debentures, and Walter's rights would have been extinguished automatically, without any action by Walter. Moreover, here, at the time

of the offer of tender, Walter took no action, made no affirmative representations about the sufficiency of the offer, and made no additional statements about the substantive aspects of the case until he filed his pretrial Statement of Issues on October 20, 1969, approximately two months prior to the time the debentures came due in full.[2]

Finally, in this case Mead's acts so flagrantly violated the debenture redemption provisions that it cannot be said that Mead offered substantial performance. When one contracting party is bound to tender a given performance, and he attempts a tender by offering performance which is substantially different from that contemplated in the contract, his attempted tender should be construed as an offer to reform the contract that gives rise to no obligation on the part of the offeree to accept, and that, if left unaccepted, is utterly ineffectual. Smeet's letter of October 19, 1963, was exactly that—an offer of reformation that was never accepted by Walter. Stated differently:

> In order to constitute a valid tender, the tenderer must offer a specific amount. While such amount need not be beyond dispute, nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due, . . ., and a mistake in tendering an amount less than the sum due is the misfortune of the tenderer, the tender having no legal significance if refused, and the position of the parties remains the same as though no tender had been made. 86 C.J.S. Tender § 7 at 562.

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2. In fact, upon receipt of the letter-offer, Walter was silent. He clearly did not comply with the terms of the offer—by turning over his debenture certificates—nor did defendants seek to compel him to comply. Under such circumstances it might be said that Walter had absolutely rejected the offer and that his silence was without prejudice to his later assertion of grounds for his rejection. *See* 5 Williston on Contracts § 744 at p. 526, where, in a passage quoted with approval, it is stated:

> But when the buyer has absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have mislead and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds.

An offer of performance, it seems to me, is not a valid tender unless made in good faith. Mead's demand that Walter surrender the debenture certificates, and its deduction of an amount that it deemed was owed the company by Walter, when compared with what was actually required of Mead under the debenture redemption provision, clearly demonstrate that Mead's redemption attempt was not made in good faith. Consequently, its offer of performance did not constitute a valid tender.[3]

Moreover, given the substantial and obvious manner in which the offered performance was deficient, it is clearly implausible that defendants could have, in good faith, believed the redemption attempt to be valid or that plaintiff could have mislead them to so believe.

The estoppel principle is therefore inapplicable under the facts of this case. The judgment of the district court should be affirmed except as to the attorney fee issue. Alternatively, in reversing that portion of the district court judgment which dealt with the redemption issue, the majority should state that its decision is without prejudice to plaintiff's right to bring a separate action under the debentures.

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3. It should be noted that the debentures involved in this case could not have been transferred by Walter without the prior written consent of Mead, therefore there is no possible justification for Mead's demand that Walter surrender his certificates before he would be allowed to recover the amounts due as there might have been had the debentures been negotiable instruments.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1342 & 74-1343

AHTO WALTER

v.

NETHERLANDS MEAD N.V.
(A Netherlands Antilles Corp.)

and W. M. O'NEIL

Netherlands Mead N.V., *Appellant in No. 74-1342*

Ahto Walter, *Appellant in No. 74-1343*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Ahto Walter, Appellee in No. 74-1342 and Appellant in No. 74-1343, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen
Judge

Dated: May 7, 1975